No. 6109

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

CHRIST LUAMA,

Appellant,

vs.

BUNKER HILL and SULLIVAN MINING and CONCENTRATING COMPANY, a corporation; FEDERAL MINING and SMELTING COMPANY, a corporation; HECLA MINING COMPANY, a corporation,

Appellees.

Brief of Appellees

Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division

---

FRED B. MORRILL,
J. W. MERRITT,
Attorneys for Appellant.
Residence and Post Office Address,
Spokane, Washington.

C. W. BEALE,
Attorney for Appellees,
Residence and Post Office Address,
Wallace, Idaho.

FILED
MAY 20 1930
PAUL P. O'BRIEN,
CLERK

No. 6109

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CHRIST LUAMA,

Appellant,

vs.

BUNKER HILL and SULLIVAN MINING and CONCENTRATING COMPANY, a corporation; FEDERAL MINING and SMELTING COMPANY, a corporation; HECLA MINING COMPANY, a corporation,

Appellees.

Brief of Appellees

Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division

---

FRED B. MORRILL,
J. W. MERRITT,
Attorneys for Appellant.
Residence and Post Office Address,
Spokane, Washington.

C. W. BEALE,
Attorney for Appellees.
Residence and Post Office Address,
Wallace, Idaho.

Subject Index

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED

	Page
ALLEGED ACTS, CONDUCT AND OPERATIONS OF APPELLEES	27
Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654	33
Wood on Limitations, Sec. 179	32
APPELLANT'S CLAIM NOT AN ORIGINAL CLAIM	23
McCarthy Suit, 147 Fed. 981	24
McCarthy Suit, 164 Fed. 927	24
McCarthy Suit, 164 Fed. 939	27
APPELLANT HAD NOTICE AND KNOWLEDGE OF BROWN INDENTURE AND OF ITS TERMS, PROVISIONS AND COVENANTS FROM DATE IT WAS RECORDED, AND IT IS CONCLUSIVE AGAINST HIM	48
19 Corpus Juris, Sec. 145, page 939	51
Decision of District Judge Cavanah	53
De Luze vs. Bradbury, 25 N. J. Equ. 70	52
Noyes v. Hall, 97 U. S. 34, 37	50
Pomeroy's Equity Jurisprudence, Sec. 689 of Vol. 2, (Third Ed.)	51
Section 5373 (3105) Idaho Compiled Statutes 1919	48
Section 5378 (3114) Idaho Compiled Statutes 1919	52
Section 5423 (3159) Idaho Compiled Statutes 1919	49
Wood v. Carpenter, 101 U. S. 135	49

APPELLANT IS BARRED AND ESTOPPED FROM QUESTIONING OR ATTACKING THE BROWN INDENTURE UPON THE GROUND OF FRAUD OR MISTAKE 54
Davis v. Consolidated Wagon etc. Co., 43 Ida. 730 61
Decision of District Judge Cavanah 57
Decisions of Supreme Court of Idaho Conclusive 68
Amy v. Watertown No. 2, 130 U. S. 320, 325 ....69, 70
Bauserman v. Blunt, 147 U. S. 647 69
Blum v. Wardell, 270 Fed. 309, 313 69
Missouri, Kansas & C. Trust Co. v. Krumseig, 172 U. S. 351, 359 68
Newberry v. Wilkinson, 199 Fed. 673, 683 69
Northern Pacific Railway Co. v. Meese, 239 U. S. 614, 619 68
Shaefer v. Werling, 188 U. S. 516, 518 68
Wood v. Carpenter, 101 U. S. 135, 141 70
Proceedings in District Court 55
Stout v. Cunningham, 33 Ida. 464 63
Subdivision 4 of Section 6611, Idaho Compiled Statutes 1919 61
Williams v. Shrope, 30 Ida. 746 65
APPELLANT DID NOT OFFER ANY PROOF AT TRIAL AS TO FRAUD OR MISTAKE 71
APPELLANT IS ESTOPPED BY HIS LACHES FROM ATTACKING THE BROWN INDENTURE ON ANY GROUND OR FOR ANY REASON 72
Ancient Egyptian Order v. Michaux, 279 U. S. 737 76
Barnett v. Wells Fargo Nat. Bank, 270 U. S. 438 75
Hays v. Port of Seattle, 251 U. S. 233, 239 75
Penn. Mutual Life Insurance Co. v. City of Austin, 168 U. S. 685 73
Upton, Assignee, v. Tribilcock, 91 U. S. 45, 55 75
ARGUMENT 2
BROWN INDENTURE 34
BROWN INDENTURE NOT A LICENSE 17
Eastman v. Piper, 229 Pac. 1002, 1004 18

BROWN INDENTURE IS AN EASEMENT AND RELEASE AND DISCHARGES APPELLEES FROM ASSERTED CLAIM OF APPELLANT 33
Hill v. Empire State-Idaho Mining & Developing Co., 158 Fed. 881 44

BROWN INDENTURE IS AN EASEMENT AND RELEASE AND A COVENANT RUNNING WITH THE LAND 45
Decision of District Judge Cavanah 125, 126
Decision of District Judge Dietrich 45
Howes v. Barmon, 11 Ida. 64, 69 47
Section 5413, Idaho Compiled Statutes 1919 48

BROWN INDENTURE GRANTS AND CONVEYS AN INTEREST AND ESTATE IN THE LANDS CLAIMED BY APPELLANT 105
Branson v. Studebaker, 33 N. E. Rep. 98, 103 106
Coffey v. Superior Court, 82 Pac. 75, 79 109
19 Corpus Juris, 863 105
Devlin on Real Estate, Deeds, Third Edition, Vol. 2, page 1671 112
Howes v. Barmon, 11 Ida. 64, 69 105
Humphrey v. Krutz, 137 Pac. 806, 808 106
Kaleialii v. Sullivan, 242 Fed. 446, 449 111
Kelly v. Calhoun, 95 U. S. 710, 713 112
Meir-Nandorf v. Milner, 34 Idaho 396, 400 111
Nellis v. Munson, 15 N. E. Rep. 739, 740 106
Peters v. M'Laren, 218 Fed. 410, 421 113
Prescott v. White, 32 Am. Dec. 266 113
Section 5373 (3105) Idaho Compiled Statutes 1919 112
Sheets v. Selden's Lessee, II Wallace, 177, 178 110
Upton, Assignee, v. Tribilcock, 91 U. S. 45 109
Webster's New International Dictionary 109

FINAL ANALYSIS OF BROWN INDENTURE 114
Atchison v. Peterson, 20 Wall. 507, 510 129
Broder v. Water Co., 101 U. S. 274 128
Decision of District Judge Cavanah Interprets Brown Indenture the Same as Decision of District Judge Dietrich and Decision of This Court 125

Decision of District Judge Dietrich in Polak Case 121
Lindley on Mines, Third Edition, Vol. 3, Sec. 841, page 2069 130
McCarthy v. Bunker Hill & Sullivan Mining & C. Co., 164 Fed. 927, 939 127
Scheel v. Alhambra Min. Co., 79 Fed. 821 119

STATEMENT OF THE CASE 1

TRIAL BEFORE THE DISTRICT COURT 78
Appellees' Objections 79
Court Has No Authority Or Power To Insert Or Interpolate Any Limitation Into Brown Indenture 93
French v. Shoemaker, 14 Wall. 314, 335 93
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462 93
First Rule of Evidence 88
22 Enc. Pl. & Prac. page 537 89
Ferguson Contracting Co. v. Manhattan Trust Co., 118 Fed. 791, 795 89
Greenleaf on Evidence, Vol. 1, Sec. 51 88
Protests of Any Agent, Attorney or Employee of Appellees Void 98
Brunzell v. Stevenson, 30 Ida. 202, 205 105
Lawyer v. Post, 109 Fed. 512 100
Reid v. Diamond Plate-Glass Co., 85 Fed. 193, 195 101
Schulz v. Hansing, 36 Ida. 121, 125 99
Section 6829 (4353) Idaho Compiled Statutes 1919 104
Section 7974 (6007) Idaho Compiled Statutes 1919 98

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CHRIST LUAMA,

Appellant,

vs.

BUNKER HILL and SULLIVAN MINING and CONCENTRATING COMPANY, a corporation; FEDERAL MINING and SMELTING COMPANY, a corporation; HECLA MINING COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellees are not content to accept the statement of the case appearing in the brief of the appellant.

For a true and complete statement of the case appellees invite the attention of this Honorable Court to the bill of exceptions (R. p. 55.) which after being re-drafted so as to include the amendments of appellees to the proposed bill of exceptions of appellant, contains the files, records and proceedings upon which the District Court rendered its judgment.

Inasmuch as that part of appellant's statement of the case which refers to the contents of the Brown indenture,

a copy thereof being annexed to the answer as Exhibit "A", omits many important parts of such indenture, and provisions thereof necessary for its interpretation having also been omitted in parts of the argument in appellant's brief, and which do not appear to have been considered by him in his review of this indenture, appellees have concluded, for the convenience of this Court and in support of their claims for such indenture, to reproduce it in the argumentative part of this brief.

Furthermore, there was inserted into appellant's statement of the case relative to his offers of proof as to taxation of the indenture language not found in such offers of proof, and which the author knew was not a part of such offers of proof.

Such inserted language appears in the last paragraph of page 13 of appellant's brief, as follows: *"and maintained that such instrument did not convey a taxable interest in land,"* and *"were not taxable and"*. That language was never submitted to the District Court, never constituted a part of such offers of proof and should not have been inserted into the statement of the case.

ARGUMENT

No extended reference will be made to the text and decisions of the courts referred to in appellant's brief since such text and decisions are not in point and are not applicable to the issues and the easement appearing in the record.

The written instrument, a copy of which is annexed to the answer as Exhibit "A", and which instrument for convenience is hereinafter referred to as the Brown in-

denture, appellees claim to be a release and easement, and they are supported in such claim by the decision of Judge Dietrich and the decision of this Court later referred to in this brief.

The argument in appellant's brief is opened with the question as to what the Brown indenture is: "Is it an easement, an easement in gross, a release and permit or a license?"

It appears from his brief that appellant has not been able to answer that question. The best that can be concluded from the language of his brief is that if there had been omitted from the indenture certain facts and matters, appearing therein, it would not be an easement; that if it did not create a certain estate, which it does create, it might be an easement in gross; that if it granted only a certain personal privilege, it might be a permit; and that if it did not make servient certain property, which it does make servient, it might be a license.

A reading of the Brown indenture forces the conclusion that it is a release and easement against the claim asserted by appellant in his amended complaint, and meets every requirement of every definition of an easement quoted in appellant's brief.

It is imposed upon corporeal property of Brown; it is imposed for the benefit of corporeal property of appellees; it describes and defines the servient estate of Brown and the dominant estate of appellees.

The Brown indenture grants and conveys to appellees and their successors and assigns forever, for the benefit of their corporeal property (their mines and mills), the right and privilege to carry on and continue in the

Counties of Shoshone and Kootenai, State of Idaho, the operations of their mines and mills (their corporeal property), to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries (which waters are corporeal property) in such operations, to dump all tailings, waste material and debris (corporeal property) that may result from such operations into those rivers, tributaries and along their banks (corporeal property), and to use the waters of those rivers and tributaries for the transportation and carrying away of all such tailings, waste material and debris; and all of the property which the appellant claims in this action, (corporeal property), Brown by his indenture made servient to said right and privilege of appellees, and in such indenture there was described a dominant estate in the appellees and a servient estate in Brown.

The contention in appellant's brief that Brown could not grant and convey such rights and privileges to appellees because they always had and possessed them is an admission of the existence of the dominant estate in the appellees, and is a complete refutation of any assertion in such brief that such dominant estate did not exist.

Starting with that admission, that appellees always had and possessed that dominant estate, there cannot be any denial by appellant that the property he now claims was by the Brown indenture subjected to and charged with such dominant estate, or any denial by him that such indenture made all the estate which he claims in such property a servient estate, or any denial that the Brown indenture is an easement on such property which creates in appellees an interest and estate therein.

In its terms, provisions and covenants the Brown indenture contains every quality of an easement as enumerated by the decisions of the Courts and by the text-writers. The rights, privileges and uses described in such indenture are property rights, privileges and uses, and in that indenture the property claimed by appellant is made servient to such property rights, privileges and uses.

By definition and decision to make "subject to" is to make "servient to."

The long quotation from the opinion of Justice Curtis in Howard v. Ingersoll, 13 How. 381, found on pages 28 and 29 of appellant's brief, defining what the banks of a river are, is mere surplusage and has no application to the matters for consideration on this appeal, and the language of Judge Rice in the Miller case, 35 Ida. 669; 209 Pac. 194, quoted and italicized in appellant's brief, to the effect that certain deeds purporting to convey title to a portion of the bed of a river are void, is equally inapplicable in this action.

Nowhere in his indenture does Brown mention the bed of any river. There is a vast difference between an attempt to grant and convey the bed of a river and a grant and conveyance of rights and privileges for the use of the waters of rivers and tributaries in the great and necessary mining and milling operations complained of in this action.

Much of the brief of the appellant is devoted to the contention that Brown could not convey to the appellees the rights, privileges and uses relative to the waters of the rivers and tributaries, mentioned in his indenture, because he did not have title to such waters. Such contention overlooks the fact that the exercise of such rights, privi-

leges and uses by appellees furnished the basis for the claim of Brown that his property had depreciated in value and been damaged, and also is the foundation for the claim asserted by the appellant in this action.

It has been the contention of appellees in previous litigation, that under the Constitution of Idaho, the property involved in this action was servient to the property right in appellees to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in their mining and milling operations, which included the use of such waters for the transportation and carrying away of the tailings, waste material and debris produced in such operations, even though in such transportation and carrying away such tailings, waste material and debris might be carried upon such property.

If such a contention had been upheld in this action appellees would have been entitled to a dismissal.

To protect themselves against an adverse decision upon that contention and against just such a claim, on account of such use, as might be asserted by Brown or by his assigns as is asserted in this action, the Brown indenture was executed to appellees for a valuable consideration, satisfactory to Brown and concerning which he has never made any complaint or objection so far as this record discloses.

If the Constitution of Idaho does not make such property servient to such use, then to deny to Brown the right to create such serviency amounts to a denial to appellees of a complete defense in this action. To create such serviency Brown granted and conveyed to appellees the right and privilege of such use, and by such grant and convey-

ance made his property subject to and charged it with that use.

While it is true that the common law doctrine of riparian rights does not exist in Idaho, while it is true that Brown had no title to the bed of the Coeur d'Alene River below ordinary high water mark, it is not true that he could not grant and convey to appellees the right and privilege to use such waters in their mining and milling operations and in the transporting and carrying away of the tailings, waste material and debris resulting from such operations, and by such grant and conveyance make his property subject to and charge the same with such use. If Brown could not make such grant and conveyance, which relieved appellees from his claim for damages on account of such use and from all damages and injuries consequent upon such use, he could not maintain any action for the recovery of any damages resulting from such use.

However, Brown could and did make such grant and conveyance. He certainly could and did, by the terms, provisions and covenants of his indenture, make his property servient to all of the rights, privileges and uses in appellees and their successors and assigns enumerated and described in such indenture, which included the right and privilege of having the tailings, waste material and debris produced by the appellees in their mining and milling operations transported and carried by the waters of the Coeur d'Alene River down to and upon his property.

Appellant had notice and knowledge of the Brown release and easement from the date it was recorded on May 24, 1911, and at the time he claims to have purchased

the property described in that release and easement, and he had no right to maintain this action which was properly dismissed by the District Court.

The Brown indenture, being an easement upon his property and creating an interest and estate in the appellees in such property, could be recorded and was recorded under the recording statute of Idaho, and is conclusive against the appellant, as will hereinafter more fully appear.

That such easement was for the benefit of the mining and milling properties of appellees there can be no doubt or question. They could not operate their mines and mills without the use of the waters, mentioned in the easement, in such operations and the use of such waters in the transportation and carrying away of the tailings, waste material and debris produced in those operations.

Brown complained of those operations and uses and claimed that the same depreciated the value of and damaged his property, and being willing for a consideration to permit those operations and uses to be continued by appellees and their successors and assigns granted and conveyed to them the right and privilege of such continuance, and made his property forever servient to the continuance of such operations and uses, and released and discharged the appellees and their successors and assigns from all damages and claims of damages to his property resulting from, caused by and consequent upon the continuation of such operations and uses.

There is no text or decision cited in appellant's brief showing that any written instrument containing such

terms, provisions and covenants as the Brown indenture is not an easement, or that it is an easement in gross, a permit or a license.

It is repeated that tested by the requirements of the elements that constitute an easement, as announced by the text and decisions found in appellant's brief defining an easement, the Brown indenture satisfies those requirements and is an easement.

It is stated in appellant's brief that in the deed of Brown no mention was made of the Brown indenture, and from that it is argued that Brown did not construe his indenture to be an easement.

Surely what Brown did not do and what he did not say is incompetent and immaterial to show his interpretation of his indenture.

Let us turn to what he did do: By the terms, provisions and covenants of his indenture he granted and conveyed an easement to appellees, which indenture is so clear, certain and unambiguous as to make impossible any other conclusion than that he intended to and knew that he did make his property subject and servient to such easement and to all of the rights, privileges and uses mentioned and described therein.

It is the settled law of the land that whatever Brown did or said to third parties relative to his easement is entirely incompetent to show his understanding and interpretation of his easement, and the same law applies to what it is claimed the agents, attorneys and employees of the appellees said or did in respect to the assessment for taxing purposes, the taxation of, or the payment of taxes on such easement.

There have been made in appellant's brief unprovoked and meritless attacks upon appellees unsupported by the record, and in connection with such attacks there has been inserted in such brief much matter not found in the record, not a part of the offers of proof of appellant and never submitted to the District Court.

It is not believed that such practice is fair to the District Court or just to appellees.

In this connection reference is had to pages 85 and 86 of the record as to the offers of proof at the trial relative to agents, attorneys and employees of appellees. The following is a summary of such offers of proof:

That the agents, attorneys and employees of defendants (appellees) protested against the instrument (Brown indenture) being listed for taxation or assessed and taxed to said defendants; that said attorneys, agents and employees appeared, a number of times, before the County Commissioners and taxing authorities of Kootenai County, Idaho, and protested against the same being assessed and taxed against the said defendant companies, and also appeared before the Attorney General of the State of Idaho, and at a special conference with said Attorney General requested said Attorney General to notify the taxing authorities of Kootenai County, Idaho, that same should not be taxed to said defendants.

That after the commencement of this action and some twelve or fifteen other actions involving the same question, and like instruments, and damage to land and crops on the Coeur d'Alene River, as herein involved, the assessor of Kootenai County, Idaho, listed for taxation said instrument and other like instruments, and thereupon

a tax was levied and assessed upon said instruments in the sum of $3220.78, the value thereof being fixed for the purpose of taxation in the sum of $81,897.00. That said tax in the sum of $3220.78 was paid on the 12th day of December, 1928. That for the year 1929 the value placed thereon for taxing purposes was the sum of $82,024.00, and a tax levied and assessed thereon in the sum of $3386.47. That the tax in the sum of $3220.78 paid on the 12th day of December, 1928, as before stated, was the first, and the only, assessment and tax that has been paid thereon.

From such offers of proof it will be noted that the only protest claimed to have been made by the agents, attorneys and employees of appellees was against the listing for taxation or assessment and the taxing of the Brown indenture to appellees, and that no protest was made relative to like instruments, or that the County Commissioners or taxing authorities ever acted upon or were influenced by such protest, or that such agents, attorneys or employees ever said anything or made any statement at any time relative to what the Brown indenture was, or that Brown ever paid any tax on his indenture or the lands described therein, or that the servient owners of like indentures ever paid any tax thereon or upon the property described therein, or that that protest ever imposed the burden of taxation on any person or persons or at all, or that such agents, attorneys and employees ever requested the Attorney General of Idaho to notify the taxing authorities of Kootenai County, Idaho, that they could not assess and tax the appellees under the Brown indenture or under like indentures, or that such Attorney General ever acted upon any

request ever made to him by any of such agents, attorneys and employees, or that any date was mentioned when such protest or request was made, or that appellees ever did anything to impose any tax upon any one whatever, or ever protested against any tax that had been assessed and levied or ever failed to pay any tax assessed and levied against them or any of their properties.

In addition to being inadmissible on account of their incompetency and immateriality such offers of proof were barred by the statute of frauds, and the subject matter thereof was not an issue in this action and was not mentioned in the amended complaint.

Notwithstanding they constituted no part of such offers of proof and were never submitted to the District Court, statements were inserted in appellant's brief as will appear from pages 38 to 42 thereof inclusive, as parts of such offers of proof, to-wit:

In speaking about the Brown indenture it is stated: "that appellees, through their agents, attorneys and employees, * * * protested against any interest in the properties therein described being assessed and taxed against appellees, and also appeared before the Attorney General of the State of Idaho, and at a special conference with him requested that he notify the taxing authorities of said County that they could not assess and tax appellees under such instruments."

"And also after the commencement of this action and some twelve or fifteen other actions, involving the same question, and like instruments, that some supposed interest of appellees was listed for taxation and thereupon a tax was levied and assessed upon said instruments, or ap-

pellees' interest in the lands described therein, in the sum of $3,220.78, * * * and said tax is the only tax that has been paid by appellees upon said instrument or the lands covered thereby."

There is nothing in the offers of proof as to such a protest or request or the assessment and taxation of a supposed interest of appellees or as to the only tax paid by the appellees on the lands covered by the Brown indenture.

In speaking about the appellees, it is stated: "they were acting in bad faith toward the servient owners, when, by their protests, they let the burden of taxation, for nearly twenty years, fall upon the servient owners, instead of paying their share of the taxes that were justly due for them to pay." There is absolutely nothing in the offers of proof relative to appellees, by their protests or otherwise, letting the burden of taxation, for twenty years or any time, fall upon servient owners, or upon any one, or that they ever failed to pay their share of taxes or any taxes that were justly due or due at all for them to pay.

Is it fair to insert such a statement into appellant's brief for which there is no support in the record?

It is further stated: "If they were acting in good faith they must have considered that the instruments were not easements and did not convey any interest in the lands described therein."

What possible excuse can be offered for that statement when it is remembered that nowhere in the offers of proof or in the record does it appear that the appellees ever acted otherwise than "in good faith," or that they ever considered the Brown indenture and similar indentures, which

were executed to them, were not easements or that they did not convey to them an interest in the lands described therein?

Based upon their assumption, and not upon the record, that the appellees did not believe that the Brown indenture and like indentures were easements and that they did not convey an interest in the lands therein described, the authors of appellant's brief stated therein as follows: "we must and do assert that they were acting in bad faith, for the only purpose of shirking taxation responsibility, and having the land owners pay a tax which appellees then must have known belonged to them to pay, and by which, as the record shows, they required the land owners, during a period of approximately twenty years, to pay many thousands of dollars of taxes, which legally and justly, should have been assumed by appellees and the land owners relieved of that burden."

Such an attack cannot be excused on any ground when it is remembered that there is nothing in the record to support it, nothing in the record showing that the appellees ever acted in bad faith, or for the purpose of shirking taxation responsibility, or of having land owners or any one pay any tax which appellees knew belonged to them, or which belonged to them at all, to pay, or ever required land owners or any one, during a period of twenty years or during any time, to pay many thousands of dollars or any sum for taxes, or to pay anything else, which legally or justly or at all should have been assumed by appellees, or any land owners relieved of the burden thereof, or that any of such land owners ever paid any tax on anything or at all.

Not believing that such attack and similar attacks appearing in appellant's brief will be considered by this Honorable Court in a review of the record in this action, no further reference will be made in this brief to such attacks, than to invite to the attention of this Court the fact that it was deliberaely stated that such attacks and the subject matter thereof, for which there is no support in the offers of proof or in the record, are offered as testimony, as will appear on page 41 of appellant's brief: "This testimony is offered for the purpose of aiding in the interpretation of the instrument, Exhibit A."

Upon what system of appellate procedure or rule of law do the authors of appellant's brief offer to this Honorable Court their unsupported, unprovoked, inexcusable attacks upon these appellees as "testimony" for the reversal of the judgment of the District Court?

It is believed such conduct is unprecedented.

The repeated statement in appellant's brief that there is no dominant estate in the appellees and no servient estate in Brown described in the Brown indenture is contradicted by the plain and unambiguous language of such indenture, and no denial as to what it contains can change its language.

The text quoted in appellant's brief from section 94 on page 907 of 19 Corpus Juris in so far as applicable to any issue in this action is against the appellant. For instance, the following part of such text is against the contention of appellant as to what Brown did not do and as to what any agent, attorney or employee of appellees protested, to-wit:

"The determination of the extent and nature of an

easement granted or reserved in express terms by deed depends upon a proper construction of the language of the instrument, from an examination of all the material parts thereof, and without consideration of extraneous circumstances, where the language is unambiguous."

That part of such text as refers to the conduct or admissions of the parties to an instrument, the meaning of which is doubtful, is not in point. There is no doubt as to the meaning of the Brown indenture, its language is clear and unambiguous. The following was the view of Judge Cavanah as to the meaning and language of the Brown indenture as expressed by him in his reply to a suggestion of Mr. Morrill that it did not cover the damages alleged in this action, to-wit: "I confess I cannot understand the English language if it doesn't. No, it is very clear." (R. p. 59.)

Furthermore, there is nothing in the offers of proof as to any conduct or admissions on the part of Brown in respect to his indenture and nothing in the entire record as to any admissions on the part of the appellees, while it does appear in the amended complaint that they have conducted their mining and milling operations and used the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such operations and for the transportation and carrying away of the tailings, waste material and debris resulting from such operations at all times in the same manner as referred to in the Brown indenture and as complained of in the amended complaint of the appellant.

However, the law and decisions supporting the claim of appellees that all statements or protests of Brown and the

appellees and their agents, attorneys and employees concerning the Brown indenture prior to or at the time of its execution are inadmissible, and that all of their statements or protests relative to such indenture subsequent to its execution are both inadmissible and barred by the statute of frauds of Idaho, will be discussed in the division of this brief where the objections of the appellees to the offers of proof of the appellant are reviewed in their regular order.

BROWN INDENTURE NOT AN EASEMENT IN GROSS OR A LICENSE

The Brown indenture, being appurtenant to the mines and mills of the appellees and to their operations thereof which include the use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such operations and in the transportation and carrying away of the tailings, waste material and debris produced by those operations, and being attached and belonging to the dominant estate of appellees, and creating an interest and estate in appellees in the property of Brown, and making the Brown property servient to the mines, mills, operations and uses of the appellees, all to be had and held by appellees and their successors and assigns forever, is an easement and is inheritable, and is not an easement in gross or a license which merely gives a permission, which permission is not inheritable.

Every right, every privilege, every use granted and conveyed by the Brown indenture, together with all appurtenances, such indenture states these appellees and their successors and assigns shall have and hold forever. Surely, that is not language creating a mere easement in

gross or a license that Brown or this appellant can revoke at pleasure.

Upon this contention there is submitted the following illuminating and convincing language of the Court in Eastman v. Piper, 229 Pac. 1002, 1004:

> "Applying these principles as aids to the construction of the instrument in question, we conclude that the right or privilege created thereby was something more than a mere personal, revocable license, that it was, in short, an easement. The right which it passed to Moffit, his heirs, or assigns was a right created by grant. The instrument expressly 'grants' to Moffit, his heirs, or assigns, the privilege of a roadway. And though a license may be created by deed, where the intention to create no more than a personal, revocable permission is clearly manifest, the fact that the instrument here under consideration expressly 'grants' the privilege of a roadway is of some significance in determining the nature of that privilege. See Walterman v. Norwalk, 145 Wis. 663, 130 N. W. 479, Ann. Cas. 1912A, 1176, where the court says: "* * * The use in the instrument of the words, 'remise, release, and forever discharge,' etc., indicates pretty clearly an intention to give something more than a mere license; to grant an easement in the land." Another suggestive feature of the instrument, and one which we deem especially pregnant with significance, is that it grants the roadway privilege to Moffit and to 'his heirs or assigns.' As we have pointed out, a license, being a mere personal privilege, is never extended to the heirs or assigns of the licensee. Indeed, any attempt by the licensee to assign the license ordinarily destroys and terminates it. Bates v. Duncan, 64 Ark. 339, 42 S. W. 410, 62 Am. St. Rep. 190; United States Coal, etc., Co. v. Harrison, 71 W. Va. 217, 76

S. E. 346, 47 L. R. A. (N. S.) 870. The grant of the privilege of a roadway to Moffit, 'his heirs, or assigns' was an express recognition that the privilege was to be inheritable and assignable But as the qualities of inheritability and assignability are inconsistent with a license, we must conclude that something more than a license was intended to be granted; that it was intended to create an inheritable interest in a servient estate---in short, an easement."

Hearing in that case denied by Supreme Court of California.

There not being anything in the text or decisions cited in appellant's brief to support a claim or holding that the Brown indenture is not an easement, it is not thought necessary to make an extended analysis of them.

Since the Brown indenture grants and conveys rights and privileges which are connected with the property of Brown and to which he makes his property servient, and on account of the exercise of such rights and privileges he claims his property has been depreciated in value and damaged, the language quoted in appellant's brief from Tinicum Fishing Co. v. Carter, 100 Am. Dec. 597, has no application to the Brown easement and is not in point. Nor are the facts stated in that case in any way similar to the allegations in the amended complaint or to the matters and things stated and the properties described in the Brown easement.

Nor is the case of Lawton v. Herrick, 67 Atlantic 986, cited in appellant's brief, and which involved riparian rights, in point. The appellant does not make any claim in this action as a riparian owner.

An upper riparian owner has the undoubted right to

contract with the lower riparian owner for the privilege to pollute the watercourse with respect to which they claim their riparian rights. The following will be found in 30 Am. and Eng. Ency. of Law (2d Ed.) page 384:

> "Contract Rights.---An upper riparian owner may by contract with the lower riparian owner acquire, as against him, the right to pollute the watercourse."

The case of Yazoo & M. V. R. Co. v. Smith, 43 So. 611, cited in appellant's brief, is not in point and the terms and provisions of the deed under consideration in that case were not in any manner or degree similar to the terms, provisions and covenants of the Brown indenture. Nor were the allegations in that case similar to the allegations in the amended complaint in this action. Therein the grade of the railroad track over which the defendant operated its trains had been raised to a higher level subsequent to the execution of the deed than existed at the time when such deed was executed, which grade elevation caused the damages complained of. In this action the acts, operations and uses on the part of the appellees alleged in the amended complaint are the same as the acts, operations and uses complained of by Brown, to-wit: their operations of their mines and mills and their use of the waters, mentioned both in the indenture and in the amended complaint, in such operations and in the transportation and carrying away of the tailings, waste material and debris resulting from such operations.

In his indenture Brown specifically refers to the future operations of the appellees and their future use of such waters therein, specifically claims that the value of his property will be reduced and such property damaged by

those future operations and uses, and specifically grants and conveys to the appellees and their successors and assigns forever the right and privilege of conducting such future operations and the future use of such waters therein, and specifically releases appellees from all future damages and claims for future damages on account of and resulting from such future operations and such future uses.

Without limitation, reservation or exception Brown in his indenture anticipated and provided against every act, operation and use by the appellees and every consequence, injury and damage resulting therefrom alleged in the amended complaint.

Nowhere in this record does it appear that the operations of the appellees have been different since the execution of the Brown indenture from their operations prior to and at the time of its execution.

However, it does not lie in the mouth of the appellant to criticise Brown or his indenture. Brown owned the lands mentioned in his indenture and had the right to make any disposal of them or to encumber them as he saw fit. The appellant knew at the time he claims to have purchased such lands that the same were subject to and encumbered with the rights, privileges and covenants of the Brown indenture and he cannot now and never could have complained as to what Brown did with relation to such lands and the execution of his indenture. Brown is not here complaining and it does not appear in the record that he ever complained as to his indenture or as to any of its terms, provisions and covenants, and the appellant and the property he claims are bound by the Brown easement.

As to the supposititious case mentioned in appellant's brief, of appellees being engaged in the lumbering business and in the operation thereof using the waters of the Coeur d'Alene River and its tributaries for floating logs and transporting and carrying away sawdust and debris resulting from such operations, and as to whether they would be liable for damages caused by the waters of such river and tributaries in carrying such sawdust and debris down to and upon the lands of Brown, the conclusive answer is that they would not be had Brown given to them a similar indenture to carry on their lumbering business, to use the waters of such river and tributaries therein, and therein made his lands subject to such operations and uses, as he gave to the appellees in this action.

As to the further supposititious case mentioned in appellant's brief of Brown designating but forty acres of his land described in his indenture, the answer is he made no such designation, but did make all of such land servient to all of the acts, operations and uses of the appellees referred to in the amended complaint, and forever released appellees and their successors and assigns from all of the consequences, injuries and damages resulting from such operations and uses as are alleged in such amended complaint.

The statement in appellant's brief that the interpretation of the Brown indenture or one similar to it by Judge Dietrich in the Polak case was not an issue in that case is not correct, as will appear later on in this brief where reference is made to the interpretation thereof by Judge Dietrich as "releases and easements."

Nor is it correct as stated in appellant's brief that Judge

Gilbert in rendering the opinion of this Court in the Polak case referred to such instrument as a "release of claims for damages to lands subject to overflow,".

His reference to such indentures or instruments, as to what lands they covered, and as to release they gave to the appellees is as follows: "and their joint acquisition of written agreements from property owners for release of claims for damages to lands subject to overflow."

The interpretation by Judge Dietrich of the Brown indenture and similar indentures as "releases and easements," and the interpretation of the same by Judge Gilbert, as "release of claims for damages to lands subject to overflow," make the lands mentioned in such indentures servient to the rights, privileges, operations and uses of the appellees described in such indentures and the acts, operations and uses of the appellees complained of in this action, and release appellees from all claims for damages alleged in amended complaint in this action, and sustain the interpretation by Judge Cavanah of the Brown indenture, and support and uphold the judgment of dismissal by the District Court, and make unnecessary any further discussion or citation of authorities in this brief. But in justice to Judge Cavanah, appellees feel it to be their duty to review the record and to submit the law and decisions applicable thereto which support the District Court in its interpretation of the Brown indenture and in the rendition of the judgment of dismissal in this action.

CLAIM OF APPELLANT NOT AN ORIGINAL CLAIM

The claim asserted by the appellant in this action is neither original nor of recent origin. On the contrary, it is

just such a claim as was asserted in McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Company, 164 Fed. 927, for Joseph M. Brown, the predecessor in interest of the appellant, and concerning the identical lands involved in this action. In truth, the material allegations in the amended complaint herein were borrowed from the bill of complaint in the McCarthy suit.

Nor is the claim asserted by the appellant of a different nature from the claim stated by Brown in his easement and release pleaded in the answers of the appellees, and which the District Court held to be a complete defense against the claim by the appellant for damages in this action.

If the lands involved in this action were damaged and destroyed by the acts, conduct and operations on the part of the appellees, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, as alleged in the bill in the McCarthy suit, prior to the commencement of such suit on November 23, 1904, in the Circuit Court of the United States for the District of Idaho, Northern Division, such lands could not have been damaged and destroyed a second time by the same acts, conduct and operations of these appellees, as alleged in the amended complaint in this action, which action was commenced in the District Court of the United States for the District of Idaho, Northern Division, February 7, 1928.

Respecting the claim for damages in the McCarthy suit, 147 Fed. 981, District Judge Beatty had this to say:

" "The complainants allege that about the year 1890

they entered into possession of the lands in question, which are low flat lands lying along the Coeur d'Alene River, and that the defendants through certain mining operations have rendered impure the water of said river, which, when it overflows their lands, poisons and destroys vegetation, as well as animal life, and ask an order restraining defendants from further depositing any mining debris into said river. Among the allegations of the complaint are that when they took possession of their lands the channel of said river was navigable for large boats, which was of great advantage in controlling the freight rates; also that the river was valuable for floating logs and timber to market; that from defendants' mining operations a large amount of material, including lead and other poisonous matter, is cast into said river, which by its overflow deposits upon said lands these poisoned materials, causing destruction of vegetation and the poisoning of the grass and hay with which it comes in contact; that such grass and hay, when eaten by domestic animals, cause their death, and the same result follows from their drinking of said waters; that these deposits have filled the channel of said river 'to such an extent that it is no longer well defined, and its banks rise but little above the stream at low water, so that any slight rise * * * causes it to overflow its banks;' that the channel in places has been filled more than 60 feet, so that places once navigable for large boats cannot now be navigated by even small boats; and that much waste and debris have been deposited upon said lands, but that noticeable evidence of these deposits and alleged injuries complained of has been chiefly since the year 1900.' "

Referring to the allegations of the bill and his examination of the lands involved, Judge Beatty said:

"Had not the affidavits convinced me that these allegations were highly colored, the personal examination made would remove all doubt that some of them are absolutely untrue. After the most careful observation, no justification appeared for the charge that the channel of the river had been so filled with mining deposits or debris that it is no longer well defined, or that it has been filled 'more than 60 feet,' or that its navigation has been obstructed, or that large deposits of such debris have been made upon the lands."

As to the first place at which he stopped, Judge Beatty said:

"The first place we stopped was at Bacon's ranch, where there was no evidence whatever of any mining deposits."

It may be interesting to note that the Bacon ranch was and is located down the river, immediately west of and adjacent to the lands claimed by the appellant.

In further reference to the allegations of the bill, Judge Beatty said:

"There was no evidence whatever to justify the assertion that the river had been greatly filled or that navigation had been impeded. The only impediment was the floating logs on their way to the mills, and the river was deep enough to float a battleship, nor is this at the high-water stage. The banks everywhere were from 4 to 6 feet above the water. A few soundings taken showed a depth of 30 feet, and those taken some time ago by Sanborn, a steamboat captain, showed as much as 40 feet in places, and he said the river is now as deep as it was in 1884, and as it was during the many subsequent years he navigated it. The wild assertions of complainants are without justification. They cannot

shelter themselves behind the flimsy veil that they believed them, because so told. A man must have some reason for his belief before asserting it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation. It must be concluded either that these complainants intended to deceive the court, or were themselves deceived by their own culpable negligence."

In the exhaustive review of the bill of complaint in the McCarthy suit, supra, in the opinion of this Honorable Court, written by Circuit Judge Ross, it appears that Joseph M. Brown was an associate of the complainants in the association of individuals referred to in the bill and the owner of lands alleged to have been damaged and injured by the acts, conduct and operations of these appellees referred to in such bill.

Judge Ross in his opinion in the McCarthy suit, supra, characterized the record therein in the following language:

"It is very evident from the record that the exaggerations and misstatements of matters of fact is very gross." (164 Fed. 939.)

ALLEGED ACTS, CONDUCT AND OPERATIONS OF APPELLEES

The acts, conduct and operations of the appellees complained of are set forth in the following allegations, found in the amended complaint:

"that for many years the defendants have from their

said properties, mined and extracted immense quantities of lead, zinc, copper, silver, and other metals, that in order to separate said minerals from the base rock, and earth in which they are found, and for the purpose of said treatment, the defendants have built, maintained, and operated, continuously, mills and concentrators, and in such operations the defendants have run through said mills and concentrators, daily many thousands of tons of said ores, the exact amount, this plaintiff has no means of knowing, and after said minerals were thus extracted these defendants dumped and cast said refuse, consisting of rock, earth, slimes, tailings, debris, and other poisonous substances into the said Coeur d'Alene River and its tributaries, and upon their banks, which deposits by the natural force and action of the waters of said streams, washed and carried into the Coeur d'Alene River, and down said River, to and during flood times, upon plaintiff's said land;". (R. p. 20.)

It is alleged in paragraph IV of the amended complaint as follows:

"that the high waters of the Coeur d'Alene River, and its tributaries, at reoccurring periods, annually, and frequently semi-annually and some years oftener, overflow the banks of said river, and flood and spread-over and upon this plaintiff's land and adjoining and adjacent land, in said valley, to a depth of from two to six feet, verying with the rise of said valley, to a depth of from two to six feet, verying with the rise of said river, and high water slowly receeding therefrom, except in low places or depression, where said waters do not flow away at all, but remain in stagnant pools, which gradually sink and percolate into the soil, that poisonous mineral ingredients with which said waters are impregnated as hereinafter setforth, are deposited

and forms sediement upon, and overflows plaintiffs said lands, and produces a destructive effect as hereinafter setforth;". (R. p. 20.)

Nowhere does it appear in the above quoted allegations of the amended complaint during what years the "reoccurring periods," referred to therein, occurred, or during what years the "poisonous mineral ingredients" were deposited on the lands. But from said allegations it appears that such deposited "poisonous mineral ingredients" "produces a destructive effect as hereinafter setforth;".

Thereafter follow the allegations as to the "destructive effect" of the deposit on the lands of such "poisonous mineral ingredients" and when they were deposited.

From the following allegations, appearing in the amended complaint, no other conclusion can be reached than that the appellant based his cause of action against the appellees upon their operations prior to "the excessive overflow in the winter of 1917 and January 1918," and upon such "excessive overflow", and not upon any operations subsequent to the "excessive overflow", or upon any other overflow, as will appear in such allegations, as follows:

"V."

"Plaintiff further alleges that the poisonous mineral matter and debris, so cast and deposited on said lands as aforesaid, has so weakened and impaired said land, that the crops growing thereon since the excessive overflow in the winter of 1917 and January 1918, are greatly inferior to what they were before said lands were overflowed as herein before described, by said polluted waters as aforesaid; that in the year 1917 and

prior thereto, and before said low or meadow land were covered to an excessive degree by said tailings, waste, and poisonous mineral substances and debris, as hereinbefore alleged, plaintiff produced on said low lands on an average of three tons of timothy hay per acre, all of an excellent quality, and readily saleable on the ranch or at the nearest market, for the best and highest prices then obtainable; that after the high waters of December 1917, and January 1918, the plaintiff received and produced less than one ton of hay per acre on the same lands, all of an inferior quality, all on account of the negligent, careless, willful, and unlawful operations of the said defendants said mines, mills and concentrators, as hereinbefore alleged; that the conditions of said low lands are such now, that even without the over flow of said polluted waters, only crops of an inferior quality can be produced thereon for an indefinite time, and further overflowing will tend to further destroy the producing qualities of the soil; that for the last four years, plaintiffs said land has produced less (1/4) one-quarter of a ton of hay annually per acre." (R. p. 24.)

"VIII."

"That prior to said injury to said low lands by reason of the overflow of said polluted waters, and the deposit thereon of said mining debris, said low lands were reasonably worth the sum of $125.00 per acre, and after said injuries said lands were worth not to exceed $10.00 per acre,". (R. p. 29.)

"IX."

"That by reason of the overflow of said lands by the said polluted waters and the deposits of said mining debris, on and over said low lands, on account thereof the crops were damaged in the sum of at least $1500.00 per year, or a total damage to said crops for the years of

1924, 1925, 1926 and 1927, in the sum of $6000.00 with interest at the rate of 7% per annum, from April 1st, 1924 to March 1st, 1928." (R. p. 30.)

Thus it will be seen that appellant again and again alleged that it was one overflow, to-wit: "the excessive overflow in the winter of 1917 and January 1918," that injured the low lands, and that as a consequence of such injury the crop of hay was reduced from three tons per acre to less than one ton per acre.

It being specifically alleged in paragraph V of the amended complaint that the time of the deposit was "the excessive overflow in the winter of 1917 and January 1918," and that the "destructive effect" was that the lands were by such "excessive overflow" "so weakened and impaired" that while they produced "three tons of timothy hay per acre," in the year 1917 and prior to the "excessive overflow," "that after the high waters of December 1917, and January 1918," the same lands "produced less than one ton of hay per acre.", it is impossible to form any other conclusion: Than that the overflow the appellant avers deposited debris and poisonous material on the lands claimed by him, was "the excessive overflow"; than that the alleged injury to the lands was the result of such deposit at the time of "the excessive overflow," and than that whatever damage, resulting from the failure of the lands to produce less than one ton of timothy hay per acre, was the consequence of the injury to the lands caused by "the excessive overflow in the winter of 1917 and January 1918."

It is unhesitatingly asserted that there is no allegation in the amended complaint:

(a) That any of the lands involved were overflowed during any year subsequent to the month of January, 1918, or that any of such lands were overflowed during any of the four years prior to the commencement of this action.

(b) That any of the lands were injured by any overflow other than "the excessive overflow in the winter of 1917 and January 1918," or that any of the lands were injured subsequent to the month of January, 1918.

(c) That any of the lands were made non-productive by any overflow other than the "excessive overflow," or that any of the lands were less productive in hay, or any other crop, as a result of any injury to the lands than the alleged injury resulting from the "excessive overflow."

By positive averments the appellant has limited the impairment of the productivity of the lands claimed by him, and the decrease in crop growth thereon to an injury to the lands caused by the "excessive overflow in the winter of 1917 and January 1918,".

Any cause of action the appellant may have had on account of such injury accrued in January, 1918, and the failure of crop production was merely a consequence of such injury and not the cause of action.

The law upon this subject is stated in Section 179 of Wood on Limitations, as follows:

> "Sec. 179. Negligence.---In actions from injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained."

The Circuit Court of Appeals in Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654, held that the statute of limitations begins to run from the time a right of action accrues for a breach of duty or contract or for a wrong, without regard to the time when actual damage results. Circuit Judge Lurton, who afterwards became a Justice of the Supreme Court, in the Court's opinion, said:

> "If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages develop, although all the consequential injuries had one common root in the single original breach or wrong. This would in effect nullify the statute."

THE INDENTURE OF JOSEPH M. BROWN IS AN EASEMENT AND RELEASE AND DISCHARGES THE APPELLEES FROM THE CLAIM OF THE APPELLANT

To protect themselves from a repetition of litigation which received the disapprobation of both Judge Beatty and Judge Ross, and from such litigation as this action, these appellees paid for the easement and release of Joseph M. Brown, dated the 17th day of October, A. D.

1910, pleaded in and a copy thereof annexed to their answer, and for similar easements and releases from almost all of the land owners in the valley of the Coeur d'Alene River, who asserted claims similar to the claim of Brown appearing in his easement and release.

That Brown's claim in his easement and release was a repetition of his claim in the McCarthy suit, and is a like claim to that asserted in this action, appears from such easement and release, which is as follows:

EXHIBIT "A".

THIS INDENTURE made the 17th day of October, A. D. 1910, between JOSEPH M. BROWN a widower of the town of Dudley, County of Kootenai, State of Idaho, the party of the first part, and Bunker Hill and Sullivan Mining and Concentrating Company, a corporation organized under the laws of the State of Oregon, Federal Mining and Smelting Company, a corporation organized under the laws of the State of Delaware, Hecla Mining Company, a corporation organized under the laws of the State of Washington, The Gold Hunter Mining and Smelting Company, a corporation organized under the laws of the State of Minnesota, Peter Larson and Thomas L. Greenough partners doing business under the firm name of Larson & Greenough, the estate of Peter Larson, Deceased, Thomas L. Greenough, and Harry L. Day, Eugene R. Day, Jerome J. Day, Eleanor B. Boyce, Sylvester Markwell, Damian Cardoner, Charles H. Reeves, L. W. Hutton, August Paulsen, Frank M. Rothrock, Charles A. Markwell and Frank P. Markwell partners doing business under the firm name of Hercules Mining Company, parties of the second part,

WITNESSETH:

WHEREAS, the said party of the first part is the owner of and in the possession of the following described property situate, lying and being in the County of Kootenai, State of Idaho, to-wit: N. W. Quarter of the S. E. Quarter, the S. W. Quarter of the N. E. Quarter and the Lot Number (2) Two of Section (2) Two in Township (48) Forty Eight. North of Range One (1) West of the Boise Meridian in Idaho,

AND WHEREAS, the said party of the first part claims that by the depreciation in the value of said property and the loss of crops, and in the disease, sickness, loss and death of certain domestic animals including horses and cattle, he has been in the past and will be in the future damaged by reason of the past and future mining and milling operations in the Counties of Shoshone and Kootenai, State of Idaho, of the said parties of the second part and the use of the waters of the Coeur d'Alene river and the South Fork of the Coeur d'Alene river and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such mining and milling operations into, and the transportation and carrying away of the same by the waters of the said Coeur d'Alene river, the South Fork of the Coeur d'Alene River and its tributaries:

NOW THEREFORE, in consideration of the sum of THREE HUNDRED TWENTY FIVE AND NO-100 Dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and which payment is hereby acknowledged in full payment and satisfaction of all damages to the said party of the first part including all damages to crops, and for the loss of crops and by rea-

son of the sickness, disease, loss and death of domestic animals, horses and cattle and to said property and each and every part thereof which said party of the first part may have sustained in the past and which he may sustain in the future by reason of the said mining and milling operations of the said parties of the second part and the said use of the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries, in said mining and milling operations and as a dumping ground for the tailings, waste material and debris resulting from such mining and milling operations and in the transportation and carrying away of the tailings, waste material and debris from such operations in the said counties of Shoshone and Kootenai, State of Idaho:

The said party of the first part does by these presents grant, bargain, sell, convey, and confirm unto the said parties of the second part and to their successors, heirs, executors, administrators and assigns forever, the right and privilege to carry on and continue in the said counties of Shoshone and Kootenai any and all mining and milling operations in which they or any of them may engage in said counties or either of them, and the right and privilege of dumping any tailings, waste material or debris that may result from such mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries or along the banks thereof, and of having such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries; and the said property of the said party of the first part and each and every part thereof is hereby made subject to and charged with the said mining and milling operations of the said parties of the

second part in the past, and the said use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene river and its tributaries in said operations, and in the said transportation and carrying away of said tailings, waste material and debris by said waters, and also with all the mining and milling operations in the future of the said parties of the second part and their successors, heirs, executors, administrators and assigns, and the said privilege of dumping the tailings, waste material and debris that may result from such mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries and along the banks thereof, and the use of the waters thereof in such mining and milling operations, and for the transportation and carrying away of all said tailings, waste material and debris that may result from all such mining and milling operations both in the said county of Shoshone and the said county of Kootenai, State of Idaho; and in further consideration of the payment of said sum, the said party of the first part, does hereby release said parties of the second part and their successors, heirs, executors, administrators and assigns from all damages and claim of damages in the future on account of any injury or damage to said property and every part there of and the loss of and damage to any and all crops upon the above described property and the sickness, disease, loss and death of any and all domestic animals thereon, which may be caused by such mining and milling operations of the said parties of the second part and their successors, heirs, executors, administrators and assigns, and the dumping of such tailings, waste material and debris as may result from said mining and milling operations into the said Coeur d'Alene river, the South Fork of the Coeur d'Alene

river and its tributaries and along the banks thereof, and the use of the said waters of the Coeur d'Alene river, the South Fork of the Coeur d'Alene river and its tributaries in such mining and milling operations and for the transportation and carrying away of all such tailings, waste material and debris that may result therefrom in the said county of Shoshone and the said county of Kootenai, State of Idaho.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, their representatives, successors, heirs, executors, administrators and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered
in the presence of:
W. B. HAGAR JOSEPH M. BROWN (SEAL)

STATE OF IDAHO, }
County of Kootenai, } ss.

On this 17th day of October, A. D. 1910, before me, W. B. HAGAR, a Notary Public in and for the said County, personally appeared JOSEPH M. BROWN known to me to be the person whose name is subscribed to the within instrument, and asknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my

hand and affixed my notarial seal the day and year in this certificate first above written.

(SEAL) W. B. HAGAR,
Notary Public

Endorsed:

STATE OF IDAHO, } ss.
County of Kootenai, }

Filed for record at the request of
R. M. WARK
on the 24th day of May, 1911 at 11:09 o'clock A. M. and recorded in Book 42 of Deeds on page 683.
D. E. DANBY
County Recorder. (R. p. 45.)

A reading of the amended complaint discloses, beyond any doubt, question or controversy, that there is asserted in this action a claim just like the claim asserted in the McCarthy suit, supra, on behalf of Joseph M. Brown for like injury to the same lands, and for a failure of crop production thereon, such as is alleged herein, also just such a claim as was asserted in Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 Fed. (2d Series) 583.

Likewise, a reading of the above quoted indenture of Joseph M. Brown discloses, beyond any doubt, question or controversy, that it applies to and includes both the claim of Brown and the claim of appellant, and constitutes a complete defense against any recovery from appellees in this action.

The claim of appellant, like the claim of Brown and the claim of Polak, is founded upon the alleged mining and

milling operations of appellees, their use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, their discharge of the tailings, waste material and debris, resulting from such mining and milling operations, into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along their banks, and the transportation and carrying away of such tailings, waste material and debris by the natural force and action of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries down said Coeur d'Alene River to and upon the lands claimed by the appellant.

All acts, uses and operations on the part of the appellees, complained of in the amended complaint, are specifically and in detail provided for and authorized in the Brown indenture, and therein and thereby appellant's alleged lands and crops have been made subject to and bound by all such acts, uses and operations, and all alleged damages resulting therefrom have been anticipated by the terms and the provisions of such indenture, and therein admitted to have been paid for by the appellees.

As set forth in the third paragraph of his indenture, Brown claimed that by the depreciation in the value of his lands, by the loss of crops, and in the disease, sickness, loss and death of his domestic animals, including horses and cattle, he had been in the past and would be in the future damaged by reason of the past and future mining and milling operations of the appellees in the counties of Shoshone and Kootenai, State of Idaho, by their use of the

waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, by their dumping of the tailings, waste material and debris, resulting from such mining and milling operations, into, and by the transportation and carrying away of such tailings, waste material and debris by the waters of said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

From such claim upon the part of Brown, no other conclusion can be reached than that the damages he complained of were caused by the overflow of his lands and property by the waters of the Coeur d'Alene River, which overflow carried and deposited thereon such tailings, waste material and debris.

Brown strengthened that conclusion by stating in his indenture that in consideration of the payment by the appellees of the sum of money mentioned therein he released them and their successors and assigns from all damages and claim of damages in the future on account of any injury or damage to his said property and every part thereof, on account of the loss of and damage to any and all crops upon said property, and on account of the sickness, disease, loss and death of any and all domestic animals on said property, which might be caused by the future mining and milling operations of the appellees and their successors and assigns, by their dumping of the tailings, waste material and debris, which are produced by their future mining and milling operations, into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along their banks, and by

their use of the said waters of the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of such tailings, waste material and debris as might result from such future mining and milling operations in the County of Shoshone and the County of Kootenai, State of Idaho.

Therefore, it is inexcusable to suggest or intimate that Brown sought money from appellees, or that they paid him, for the right and privilege of having the tailings, waste material and debris, produced in their mining and milling operations, merely transported and carried away by the waters of the Coeur d'Alene River confined and flowing within its banks.

Brown's lands were not situate in the waters or in the channel of the Coeur d'Alene River between its banks.

His crops were not grown in the waters or in the channel of the Coeur d'Alene River between its banks.

His domestic animals were not kept or fed or pastured in the channel of the Coeur d'Alene River between its banks.

It cannot under any fair or reasonable construction or interpretation be contended that Brown's indenture did not and does not grant and convey to these appellees the right and privilege of having all tailings, waste material and debris, produced by them in their mining and milling operations, deposited upon the lands and crops involved in this action by the waters of the Coeur d'Alene River while

transporting and carrying away such tailings, waste material and debris.

Every act with which the appellees were charged in the amended complaint and every consequence alleged to have resulted therefrom were authorized, provided for, sanctioned and permitted by the Brown indenture which specifically makes the lands and crops claimed by the appellant subject to all the alleged mining and milling operations of the appellees of whatever character they may be, to all the alleged use by them of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, to all the alleged use by them of such waters and of such rivers and tributaries for the alleged dumping therein of all tailings, waste material and debris produced by such mining and milling operations, to all the alleged use by them of all such waters for the transportation and carrying away of all such tailings, waste material and debris and to all the alleged depositing of such tailings, waste material and debris upon such lands and crops by the alleged overflowing thereof by the waters of the said Coeur d'Alene River.

Neither Brown nor the appellant could maintain an action against these appellees for such mining and milling operations, for such use of said waters therein, for such depositing of said tailings, waste material and debris into the waters of said rivers and tributaries and for transportation and carrying away of such tailings, waste material and debris by the waters of the Coeur d'Alene River flowing only in its channel between its banks, even though

the Brown indenture did not exist.

Such is the decision and holding of Judge Dietrich in Hill v. Empire State-Idaho Mining & Developing Co., 158 Fed. 881, wherein he used the following language:

> "Moreover, the damage for which recovery is sought is not the direct, but only the consequential, result of the defendant's acts. So far as appears, it had the right to erect and operate its reduction works, and, in casting into Canyon creek its waste material, it infringed upon no right of the plaintiffs. It was only by reason of the intervening agency of high water, the effect of which was uncertain and contingent, that the defendant's acts indirectly resulted in the injury to plaintiffs' land."
>
> * * * * *
>
> "Assuming that the defendant was negligent in casting into Canyon creek poisonous substances, and in filling the channel of the stream therewith, and in not taking proper precautions to impound such waste material and prevent it from being discharged upon plaintiffs' land, such negligence of itself did not constitute a right of action in favor of plaintiffs. Negligence alone does not create a right of action. There must be negligence and resulting damage, and until the waters overflowed the plaintiffs' land they could not have recovered even nominal damages."

That decision was rendered by Judge Dietrich January 24, 1908, two years, eight months and twenty-three days before Brown executed his indenture on the 17th day of October, 1910.

That decision was well known to these appellees and was doubtless known to Brown.

With their knowledge of that decision it is inconceivable

that appellees paid Brown for the execution of his indenture merely for permission to conduct their mining and milling operations, to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations, to dump the tailings, waste material and debris, produced by such mining and milling operations, into such rivers and tributaries and to have such tailings, waste material and debris transported and carried away by such waters of the Coeur d'Alene River as were confined to and flowed only in its channel between its banks.

With his knowledge of that decision it is equally inconceivable that Brown should claim compensation from appellees for damages for the transportation and carrying away of their tailings, waste material and debris by the waters of the Coeur d'Alene River which did not overflow his lands.

THE INDENTURE OF JOSEPH M. BROWN IS AN EASEMENT AND RELEASE AND A COVENANT RUNNING WITH THE LAND

This indenture of Joseph M. Brown was one of the indentures referred to in the amended complaint in the Polak case, supra, interpreted and construed in that case by District Judge Dietrich and by this Court.

In the amended complaint in the Polak case, in which these appellees and other mining companies were made defendants, it was alleged that such defendants and other mine owners, during the last ten or fifteen years, acquired by purchase, evidenced by written agreements running to them and other mine owners, from various property

owners owning lowlands along, adjoining and adjacent to the Coeur d'Alene River, the right and privilege to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries in their mining and milling operations, for the dumping and depositing of tailings, debris, detritus, refuse and waste material, produced by such mining and milling operations into, and for the transportation and carrying away of the same by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries, and that they acquired by such written agreements such rights and privileges in and to about ninety per cent of all the lands subject to overflow along the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries.

There not having been any such agreement as to the Polak lands, the defendants in the Polak case moved to strike out such allegations as being irrelevant and redundant matter inserted in the amended complaint in that case, which motion was overruled by the District Court, presided over by District Judge Dietrich. Such written agreements included the Brown indenture.

In passing upon the motion to strike out Judge Dietrich was called upon to interpret and construe and did interpret and construe the terms, provisions and covenants of such written agreements, which included the Brown indenture, and which were alike in terms, provisions and covenants, differing only as to parties of the first part, lands and amounts paid, but including among the parties of the second part therein these appellees. Thus it will be seen

the Brown indenture was made an issue in the Polak case.

Many of such written agreements were received in evidence at the trial over the objections of the defendants which included, among other grounds, that they were incompetent, immaterial and not responsive to the issues in that case, and again District Judge Dietrich was called upon to interpret and construe the terms, provisions and covenants of such written agreements, and in order to permit them to be admitted in evidence and used as evidence in the Polak case he did interpret and construe such written agreements and in doing so used the following language in his decision in that case in referring to the acts, conduct and operations of the defendants therein complained of, and to the competency and application of such written agreements to the issues in that case, to-wit:

> "and, as shown by several instruments in evidence, they acted together in securing from farmers in the valley, releases and easements as against just such a claim as the plaintiff is here asserting."

The Brown indenture having been held by District Judge Dietrich to be a "release and easement", we pass to the decision of the Supreme Court of Idaho in Howes v. Barmon, 11 Idaho 64, where on page 69 that Court held that an easement is an interest or estate in real property, in the following language:

> "On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds."

From the decision of the Supreme Court of Idaho, holding that an easement is an estate in real property, we pass to Section 5413 of Idaho Compiled Statutes 1919 to show

that the Brown indenture, being an easement and constituting an estate in real property, is an instrument that could be recorded in the office of the County Recorder of the County of Kootenai, State of Idaho.

That section is as follows:

> "Sec. 5413 (3149) What may be recorded. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter. (R. S. Sec. 2990.)"

It was admitted at the trial that the Brown indenture was recorded in the office of the County Recorder of the County of Kootenai, State of Idaho, on the 24th day of May, 1911, in Book 42 of Deeds, beginning on page 683 thereof, records of said Recorder's office. (R. p. 95.)

APPELLANT HAD NOTICE AND KNOWLEDGE OF THE BROWN INDENTURE AND OF ITS TERMS, PROVISIONS AND COVENANTS FROM DATE IT WAS RECORDED, AND IT IS CONCLUSIVE AGAINST HIM

The Brown indenture, conveying an estate in real property, is a conveyance under Section 5373 of Idaho Compiled Statutes 1919, which is as follows:

> "Sec. 5373. (3105) Conveyance: How made. A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. (R. S. Sec. 2920.)"

The appellant had notice and knowledge of the Brown indenture and of its terms, provisions and covenants

from the time it was recorded on the 24th day of May, 1911, by virtue of the provisions of Section 5423 of Idaho Compiled Statutes 1919, which section is as follows:

> "Sec. 5423. (3159) Record as notice. Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. (R. S. Sec. 3000.)"

In passing upon this proposition of notice and knowledge on the part of the appellant, Judge Cavanah in his opinion had this to say:

> "This written instrument having been recorded in the office of the County Recorder of Kootenai County on May 24th, 1911, the plaintiff had knowledge of its existence and terms on that date and when he became the owner of the lands in question some five years before the commencement of this action. There could be no concealment of its existence as the public records of the county are open to all and is such evidence as operates as notice to the plaintiff, a subsequent purchaser of the land. Wood v. Carpenter 101 U. S. 1291; Noyes v. Hall, 97 U. S. 34, 38." (R. p. 68.)

In Wood v. Carpenter, 101 U. S. 135, the Supreme Court of the United States had under consideration certain confessed judgments which had been recorded, also certain conveyances of real property which had been recorded in proper offices. Concerning the confession of such judgments and the execution of such conveyances it was alleged the defendant had been guilty of fraud and as to such fraudulent transactions the plaintiff had no

knowledge until a few weeks before the commencement of his suit.

In holding such allegations of ignorance at one time and of knowledge at another to be of no effect, the Court referred to such judgments and conveyances in the following language:

> "The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices."

In Noyes v. Hall, 97 U. S. 34, 37, the Supreme Court of the United States had this to say:

> "Deeds, mortgages, and other instruments of writing which are authorized to be recorded, take effect, by the law of that State, from and after the time of filing the same for record, and operate as notice to creditors and subsequent purchasers. Rev. Stat. of Illinois, 1874, 278, sect. 30.
>
> Argument to show that the respondent had due notice of the claim of the complainant is quite unnecessary; as the case shows, beyond controversy, that the deed under which he acquired the title to the premises was duly recorded, and that he was, before that time, in the open, visible, and exclusive possession of the same, which, by the settled law of that State, is constructive notice to creditors and subsequent purchasers. Truesdale v. Ford, 37 Ill. 210.
>
> Record evidence of a conveyance operates as notice, and so may open possession: the rule being that actual, visible, and open possession is equivalent to registry. Cabeen v. Breckenridge, 48 id. 91; Dunlap v. Wilson, 32 id. 517; Bradley v. Snyder, 14 id. 263."

Based upon the above decision of the Supreme Court of the United States it is believed that no argument upon the part of attorney for the appellees should be necessary to show that the appellant had notice and knowledge in May, 1911, and at all times thereafter, of the Brown indenture and of its terms, provisions and covenants, and that he could not in this action attack it on the ground of fraud or mistake, or on any other ground, and that the judgment of the District Court was rightly and justly rendered and entered.

The following text will be found on page 939 of 19 Corpus Juris:

> "Sec. 145. A. WITH NOTICE OF EASEMENT.---1. In General. One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement."

Mr. Pomeroy in his work on Equity Jurisprudence in Section 689 of Vol. 2, (Third Ed.), states the law on this proposition of appellant's knowledge of the Brown indenture and the extent to which he is bound thereby, as follows:

> "Section 689. Notice of a Prior Covenant.---On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting

it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law 'runs with the land.' "

In De Luze vs. Bradbury, 25 N. J. Equ. 70, the Chancellor held:

"The purchaser of land subject to a continuous and apparent easement takes it subject to the burthen of that easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time such purchaser bought."

Thus it will be seen that these appellees were not only entitled to a judgment dismissing this action, but that a court of equity should enjoin the appellant from interfering with the benefits, enjoyments, rights and privileges which the Brown indenture grants and conveys to appellees.

The law of Idaho, enacted in Section 5378 of Idaho Compiled Statutes 1919, makes the Brown indenture conclusive against appellant.

That section is as follows:

"Sec. 5378. (3114) Conclusiveness of conveyance: Bona fide purchasers. Every grant or conveyance of an estate in real property is conclusive against the grantor,

also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. (R. S. Sec. 2929.)

The ruling of Judge Cavanah upon the binding and controlling force and effect of the Brown indenture is stated in the following forceful and convincing language of his opinion:

"The agreement being a release and an easement, it grants an interest in the land, as held by the Supreme Court of the State in the case of Howes v. Barmon, 11 Ida. 64, where the court said: 'On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds.' And that being true it was entitled to be recorded as provided by section 5413 of the Idaho Statutes, which provides that 'Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter.' After it was recorded it became conclusive against Brown and every one claiming the land subsequently to him. Section 5378, Idaho Statutes. The plaintiff, after having knowledge of the instrument as it appeared upon the public records, purchased the land burdened with the existing easement, and subject to it, and has no greater rights than his grantor to prevent the assertion of the release and easement as a bar to a recovery." (R. p. 72.)

The holding of Judge Deitrich that the Brown indenture is a "release and easement" upon the property claimed by appellant and the heretofore mentioned holding of this Court that such indenture releases all claims for damages to such overflowed property, thereby affirming such

holding of Judge Dietrich, make the interpretation of such indenture by Judge Cavanah incontestable and entitle appellees to an affirmance of the judgment of dismissal.

APPELLANT IS BARRED AND ESTOPPED FROM QUESTIONING OR ATTACKING THE BROWN INDENTURE UPON THE GROUND OF FRAUD OR MISTAKE

Immediately after this action came on regularly for trial in the District Court on the 6th day of June, 1929, and before the jury was empaneled, these appellees moved the District Court, as follows:

> "Having appeared separately in this action each of the defendants, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company, Hecla Mining Company and Sunshine Mining Company, now comes and moves this court on the pleadings in this action for a judgment of dismissal of this action against it upon each of the following grounds:
>
> (a) That the amended complaint in this action does not state facts sufficient to constitute a cause of action against any of said defendants.
>
> (b) That the cause of action set forth in the amended complaint in this action is barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.
>
> (c) That all of the cause of action set forth in such amended complaint referring to acts, matters and things accruing prior to four years before the commencement of this action is barred by the provision of

Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.

(d) That each of said defendants has been misjoined as a party defendant in this action with the other defendants therein.

(e) That by the indenture in writing, set forth in the answer of each of said defendants, the genuineness and due execution of which has been admitted by the plaintiff, the plaintiff in this action is barred and estopped from maintaining and prosecuting this action against each of the said defendants, Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company.

(f) That the plaintiff is barred and estopped by the statute of limitation, his inaction, acquiescence and laches from attacking such written indenture or its force or effect or validity on the grounds of fraud, misrepresentation, concealment, ignorance or upon any other ground or reason whatever." (R. p. 57.)

After Mr. Beale, attorney for appellees, and Mr. Morrill, attorney for appellant, had each made his argument on the above motion to the District Court, the following proceedings were had in open court:

"THE COURT: This agreement is clear to me that it releases the companies from any past or future damages caused upon this property or crops by reason of the mining operations. You have released these companies for past and future damages to the land in question, or crops, by reason of their operations in running mill tailings down the river. That instrument is clear to me so far as that is concerned. There isn't any question about the language of that instrument.

MR. MORRILL: I think learned counsel, Mr. Beale, drew it as strongly as he could, but I do not think it covered this particular damage alleged here.

THE COURT: I confess I can't understand the English language if it doesn't. No, it is very clear. The only question bothering me is whether or not at this time you can come in and attack the force and effect of this instrument on the ground of fraud at this time. * * * * * *

MR. BEALE: That question is vital to this case.

THE COURT: The only question is whether they can set up the ground of fraud at this late date.

MR. BEALE: If the court please, I would rather have that question decided right now, rather than go to the expense and trouble of a long drawn out trial.

THE COURT: Yes, I think it is proper to save the parties the expense of going through a trial if the equitable defense is well taken. That is a principle of equity.

As to the next contention of the defendants on this motion for judgment on the pleadings, relative to the exhibit attached to the answer known as Exhibit "A" I believe, I have reached the conclusion, as to a portion of that contention, that is, the failure to file the affidavit required by the statute, that the execution is now admitted under the pleadings, but does not go so far as to deny the plaintiff the right to set up the defense of fraud in the execution of that instrument, provided it is not barred under the three year statute or the doctrine of laches. * * * * * *

The instrument was executed in October, 1910, and recorded on the 24th day of May, 1911, upon the public records of Kootenai County. Mr. Brown, the then

owner, executed this instrument covering this property in question on which this damage is claimed to have occurred, and conveyed it to the plaintiff some ten or eleven years afterwards. I understand the plaintiff has been the owner of the property for about six years.

MR. MORRILL: The only thing, Your Honor, if my associate and myself, in looking this question up, find that counsel is correct in his contention, why of course there will be no use for us to go on with this case, or the other cases in the same situation.

(Counsel consult)

MR. MORRILL: We have decided to let it go over the term under the circumstances, and probably we can dispose of it without a great deal of trouble on the part of counsel on both sides, especially on the part of the court. In the meantime we can look it up. I think there are at least three or four cases pending where the same question is involved. If we decide the courts are against our contention, and in favor of the contention of counsel, we might as well dismiss the cases. For that reason we have agreed to let the cases go over and abide the result of the searching of the law.

THE COURT: Under the statement of counsel that it is not the desire to try the case this term, I will take the motion under advisement and if you desire fifteen days to file briefs. * * * * * *

MR. BEALE: You have also decided as to the validity of the instrument?

THE COURT: Yes. It is just the question as to whether or not it is too late to raise the question of fraud against this instrument." (R. p. 58.)

The appellant having admitted the genuineness and due execution of the Brown indenture, Judge Cavanah, in

holding that the appellant could not attack such indenture on the ground of fraud or mistake, in his opinion had this to say:

"The three year statute of limitations relative to relief on the ground of fraud or mistake governs the time within which the plaintiff may attack the instrument, and the time commences to run on the discovery of the fraud by the aggrieved party of the facts constituting the fraud or mistake. Section 6611, Idaho Compiled Statutes. To like effect is the language of the Supreme Court in Williams v. Shrope, 30 Ida. 746, where the court said, 'The action based upon fraud must be commenced within three years from its discovery or it is barred.' The inquiry then is, Can the defense of fraud under the pleadings be set up and evidence admitted at this time? One seeking to avoid the bar of the statute must show that he has used due diligence in discovering the facts or that there was a concealment of the facts such as would prevent a person exercising ordinary diligence from discovering them. If he might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it. When the court can determine from the pleadings whether ordinary diligence was, or was not, used and there was no concealment as would prevent one from using due diligence from discovering the facts, it then becomes a question of law to be decided by the court. This doctrine has on several occasions been recognized by the Supreme Court of the state in referring to section 6611 of the state statutes. Stout v. Cunningham, 33 Ida. 464; Davis v. Consolidated Wagon, etc. Co., 43 Ida. 730. Recognizing then the settled principle that federal courts will accept the construction of a state statute adopted by its highest court (Northern Pac. Ry. Co. v. Meese, 239 U.

S. 614; Schaffer v. Werling, 188 U. S. 516, 518; Missouri Kansas & C. Trust Co. v. Krumseig, 172 U. S. 351; Blum v. Wardell, 270 F. 309, 313), we approach the consideration of the undisputed facts as disclosed by the pleadings relative to the provisions of the written agreement attached to the answers pertinent to the question as to whether the plaintiff, at this time, is barred and estopped from attacking the instrument on the ground that it was procured by fraud, (the genuineness and due execution having been admitted).

This written instrument having been recorded in the office of the County Recorder of Kootenai County on May 24th, 1911, the plaintiff had knowledge of its existence and terms on that date and when he became the owner of the lands in question some five years before the commencement of this action. There could be no concealment of its existence as the public records of the county are open to all and is such evidence as operates as notice to the plaintiff, a subsequent purchaser of the land. Wood v. Carpenter 101 U. S. 1291; Noyes v. Hall, 97 U. S. 34, 38. If the instrument was procured by fraud or mistake it would seem that by the use of ordinary diligence either Brown, the one who executed it some eighteen years ago, or the plaintiff, since it was recorded could have discovered it before the running of the three year statute of limitation relative to relief on the ground of fraud or mistake if there existed facts constituting fraud or mistake. The instrument remaining upon the public records for such a long period of time was notice enough to excite attention and put the plaintiff and his predecessors in interest on their guard and call for inquiry. The recording of it removed all intention to prevent inquiry or exclude suspicion of there having been any fraud or mistake used in the procuring its execution or of its provisions.

Courts uniformly declined to assist one who has slept upon his rights and shows no excuse for his laches in asserting them. Pen. Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685; Willard v. Wood, 164 U. S. 502; Hays v. Port of Seattle, 251 U. S. 233, 239.

There having been an unmeasurable and unexplained length of time in the present case under circumstances permitting diligence to do what in law should have been done, in asserting the right to attack the agreement on the ground of fraud, and for such inexcusable delay the doctrine of laches and the three year statute of limitations would seem to apply and bar the plaintiff from asserting that the agreement was procured by fraud. Newberry v. Wilkinson, et al., 199 Fed. 673." (R. p. 67.)

Supported by the statutes of Idaho, the decisions of her Supreme Court, of this Court and of the Supreme Court of the United States and the indisputable record in this action, the above holdings of the District Court are absolutely incontestable.

Let the law and the decisions speak for themselves.

Before presenting them to this Court it is thought no criticism can be attached to expressing a surprise that attorneys for appellant have taken this appeal in view of the statement of Mr. Morrill in the District Court at the hearing on the motion for judgment on the pleadings, to-wit: that if he and his associate, in looking up the question, found the attorney for the defendants to be correct in his contention for the above holdings, they might as well dismiss this action and other similar actions in which they appeared. (R. p. 61.)

And this surprise is further justified when it is remem-

bered that such attorneys did not present any law or court decision to the District Court and do not in appellant's brief present any to this Court which in any manner or degree questioned or combatted such contention of the attorney for defendants (appellees).

All relief on behalf of the appellant on the ground that the Brown indenture was procured by fraud or mistake is barred by subdivision 4 of Section 6611 of Idaho Compiled Statutes 1919, which is as follows:

"Sec. 6611. (4054) Statutory liabilities, trespass, trover, replevin and fraud. Within three years:

1. * * * * *

2. * * * * *

3. * * * * *

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (R. S. Sec. 4054.)"

The following decisions of the Supreme Court of Idaho, which interpret subdivision 4 of Sec. 6611, supra, bar the appellant from attacking the Brown indenture, the genuineness and due execution of which he admitted, on the ground of fraud or mistake either by complaint or by defense or by cross-complaint.

The Supreme Court of Idaho in Davis v. Consolidated Wagon etc. Co., 43 Idaho, 730, in reversing the trial court for not dismissing the action and in its decision directing such dismissal, had this to say:

"However, the facts stipulated are not sufficient to

bring respondent within the rule contended for by him, in that the alleged concealment might have been sooner discovered had he exercised ordinary diligence. He ascertained , on seeking advice of counsel in July, 1917, that the statements made to him were false, and the notes were not attached. It would seem that respondent was required to promptly consult counsel when it became known to him that the notes were claimed under attachment, in order to ascertain the legal status of appellant's title thereto. Instead, he apparently is not concerned about the matter further, and sleeps on his rights for more than three years before inquiring of counsel what they may be. This is not ordinary diligence.

In the case construing C. S., sec. 6611, subd. 4, providing that in case of an action for relief on the ground of fraud or mistake, the action will not be deemed to have accrued until after the discovery of the fraud, etc., this court said:

'In cases of this character where fraud, concealment and ignorance of the facts are relied upon to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made, and why it was not made sooner.' (Stout v. Cunningham, 33 Ida. 464, 196 Pac. 208.)

To like effect is the language of the court in Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, where the United States circuit court of appeals for the eighth

circuit had under consideration the application of the rule contended for by respondent as then prevailing in Iowa." * * * * *

In concluding its decision, the Court said:

"We recommend that the judgment be reversed and the cause remanded, with directions to dismiss the action."

In Stout v. Cunningham, 33 Idaho, 464, the Supreme Court of Idaho, in affirming the judgment of dismissal by the trial court, where subd. 4 of sec. 6611, supra, was involved, had this to say:

"In cases of this character where fraud, concealment and ignorance of the facts are relied upon to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made, and why it was not made sooner. The amended complaint is silent as to how the contract was obtained, neither are there any reasons assigned why the contract was not sooner obtained. In other words, the circumstances of the discovery are not fully stated. The fact that Cunningham gave out no information of his transactions with the Mainlands would not be sufficient, or the fact that the plaintiffs knew nothing of the transaction between the Mainlands and Cunningham until they procured a copy of the contract between Cunningham and the Mainlands, would likewise be insufficient to bring them

within the provisions of the statute. The general rule is announced in the case of Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807:

'In cases of this character the plaintiff is held to stringent rules of pleading . . . . , and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been before made. This is necessary to enable the defendant to meet the fraud and the time of its discovery. A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner."

In the case of Buchner v. Calcote, 28 Miss. 432, and Nudd v. Hamblin, 8 Allen (Mass.), 130, it is held that:

'A party seeking to avoid the bar of the statute on account of fraud must aver . . . . that he used due diligence to detect it and if he had the means of discovery in his power, he will be held to have known it.'

The fraud, if any existed, was brought home to appellants on April 30, 1907, and on May 13, 1907. Knowledge of such facts as were communicated to appellants was of such a character as to put them upon inquiry, and is equivalent to knowledge of the fraud, which being true, as appears from the facts alleged in the amended complaint, the statute of limitations barred their right of recovery and the action of the trial court in sustaining the demurrer was proper. The judgment is affirmed, with costs to respondent Cunningham."

Notice and knowledge of the existence of the Brown

indenture and of its contents "were brought home" to appellant upon its being recorded on the 24th day of May, 1911, and he is barred by subd. 4 of sec. 6611, supra, from attacking such indenture on the ground of fraud or mistake.

In Williams v. Shrope, 30 Idaho, 746, the defendants admitted the execution of the mortgage sought to be foreclosed in that action.

In this action the appellant admitted the genuineness and due execution of the Brown indenture.

In Williams v. Shrope, supra, the defendants interposed the defense that the land described in the mortgage was sold to them upon false and fraudulent representations.

In this action any attack on the Brown indenture must be on the ground that it was procured by fraud.

The defense in Williams v. Shrope, supra, against the mortgage was identically the same as any defense appellant could have offered in this action against the Brown indenture.

The Supreme Court of Idaho in Williams v. Shrope, supra, in affirming the judgment of the lower court denying the defense of the defendants, asserted on the ground of fraud, had this to say:

> "The respondent demurred to the answer and cross-complaint on the ground, among others, that the defense pleaded therein was barred by the provisions of subd. 4, sec. 4054, Rev. Codes, relating to the limitation of actions. The demurrer was sustained by the court, and the defendants declining to plead further, the evidence was submitted and a decree of foreclosure

thereupon entered, from which the defendants Shrope appeal to this court and assign as error the action of the court in sustaining the demurrer.

Assuming that the answer and cross-complaint were sufficient in form and substance to support the defense of fraud in the original sale (matters which this court does not directly pass upon because not necessary here), the only question to be passed upon is: Was the defense interposed in time or was it barred by the statute? The action based upon fraud must be commenced within three years from its discovery or it is barred. The appellants allege they discovered the fraud in 1913, but they do not negative a prior discovery in their pleading. There is nothing in their answer or cross-complaint showing that this was the first time the matter was called to their attention. But they do allege that on August 26, 1911, they paid an assessment to the irrigation district to pay interest on bonds and expenses of the district. Here, then, there was knowledge that they were included within the district and were being taxed to pay the district's bonded indebtedness. The fraud, if any existed, was brought home to them on August 26, 1911. They cannot be heard to say, after such fact is brought home to them, that they still did not know of the fraud, because knowledge of such facts as would put them upon inquiry is equivalent to knowledge of the fraud. (Citations omitted.)

We conclude, therefore, from the facts alleged in this answer and cross-complaint that the statute of limitations would commence to run on the cause of defense of the appellants on August 26, 1911, and that such would be barred August 26, 1914, nearly a year prior to the filing of the answer, and that the action of the trial court in sustaining the demurrer was proper.

The judgment is affirmed, with costs to respondent as against the appellant John Shrope."

The Supreme Court in Williams v. Shrope, supra, held that it was not necessary for it to pass upon the sufficiency or insufficiency of the defense of fraud set up by the defendants in that action, and that the only question to be passed upon by it: "Was the defense interposed in time or was it barred by the statute?"

Upon the authority of Williams v. Shrope, supra, interpreting subd. 4 of sec. 6611, supra, it was not necessary or proper for the District Court in this action to pass upon the sufficiency or insufficiency of any defense based upon the fraudulent procurement of the Brown indenture. The only question to be considered and decided by the District Court: "Was the defense interposed in time or was it barred by the statute?"

Unqualifiedly and indisputably upon the authority of the decisions of the Idaho Supreme Court such defense on the part of the appellant in this action is barred by the statute.

If there were any fraud in the procurement of the Brown indenture, under the decisions of the Supreme Court of Idaho and the decisions of the Supreme Court of the United States, appellant had notice and knowledge of such fraud on the 24th day of May, 1911, the date when the Brown indenture was recorded, and he is barred by the statute of limitation from attacking such indenture on the ground of fraud or mistake, and he is estopped on account of his laches from attacking it on any ground whatever.

That the interpretation of subd. 4, sec. 6611, supra, by the Supreme Court of Idaho, is conclusive and controlling, will appear from the following decisions:

In speaking about the construction placed by the Supreme Court of the State upon its statutes, the Supreme Court of the United States in Schaefer v. Werling, 188 U. S. 516, on page 518, said:

> "Of course, the construction placed by the Supreme Court of a State upon its statutes is, in a case of this kind, conclusive upon this court. Forsyth v. Hammond, 166 U. S. 506, 518, and cases cited."

In Missouri, Kansas & C. Trust Co. v. Krumseig, 172 U. S. 351, the Supreme Court of the United States, on page 359, had this to say:

> "The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In Northern Pacific Railway Co. v. Meese, 239 U. S. 614, Mr. Justice McReynolds, in delivering the opinion of the Supreme Court, on page 619, said:

> "It is settled doctrine that Federal courts must accept the construction of a state statute deliberately adopted by its highest court. Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116; Fairfield v. Gallatin, 100 U. S. 47, 52. The Supreme Court of Washington in Peet v. Mills construed the statute in question and we think its opinion plainly supports the holding of the District Court and is in direct opposition to the conclusion reached by the Circuit Court of Appeals." * * * * *
>
> "The judgment of the Circuit Court of Appeals must be reversed and the action of the District Court affirmed."

In the case of Blum v. Wardell, 270 Fed. 309, on page 313, Judge Rudkin said:

> "The plaintiffs further contend that this court is not bound by the construction placed upon the laws of California by the highest court of the state. With this contention I am unable to agree."

In Newberry v. Wilkinson, 199 Fed. 673, on page 683, District Judge Wolverton, in delivering the opinion of this Court, said:

> "Further than this, it is settled that the federal courts will adopt and follow the decisions of the highest courts of the states in construing and applying local statutes of limitation. Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316."

In Bauserman v. Blunt, 147 U. S. 647, cited by this Court in Newberry v. Wilkinson, supra, the Supreme Court of the United States, in addition to holding that the construction given by a Supreme Court of the State to a statute of limitation of the State, will be followed by the Supreme Court of the United States, even in a case decided the other way in the Circuit Court before the decision of the State court, held as follows:

> "The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

and cited and approved its language in Amy v. Watertown. No. 2, 130 U. S. 320, 325, to-wit:

> "But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it."

In Amy v. Watertown. No. 2, supra, in stating the rule respecting a state statute of limitation, the Supreme Court said:

"The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

In Wood v. Carpenter, supra, where a statute of limitation of the State of Indiana was under consideration, the Supreme Court of the United States said:

"The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. Martin, Assignee, &c. v. Smith, 1 Dill. 85, and the authorities cited.

'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' Kennedy v. Greene, 3 Myl. & K. 722.

'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' Angell, Lim., sect. 187 and note.

A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."
* * * * *

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude

suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself."

Referring to statutes of limitation, the Court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed is itself a conclusive bar."

The statute of Idaho and the decisions of the courts, both Federal and State, so completely support and uphold the ruling of the District Court, that appellant is barred from attacking the Brown indenture on the ground of fraud or mistake, as to make such ruling incontestable.

NO PROOF OFFERED AT THE TRIAL AS TO FRAUD OR MISTAKE

Notwithstanding the District Court on September 4th, 1929, made an order denying the motion of the defendants for judgment on the pleadings, and that this action came on for trial before the Court without a jury, a jury having been waived in writing by the parties, plaintiff and defendants, no proof whatever was offered at the trial on behalf of appellant as to any fraud or mistake in the procurement of the Brown indenture, and no such proof could have been offered since this indenture was not pro-

cured by fraud or mistake.

As stated by Judge Cavanah: "There isn't any question about the language of that instrument." * * "No, it is very clear." (R. p. 59.)

It has never been suggested or intimated that Brown ever questioned his indenture or ever expressed any disapproval of any of its terms, provisions or covenants.

Its language is so intelligible and unambiguous as to preclude any attack, at law or in equity, upon its contents or due execution.

APPELLANT IS ESTOPPED BY HIS LACHES FROM ATTACKING THE BROWN INDENTURE ON ANY GROUND OR FOR ANY REASON

To permit the appellant to deprive the appellees of the rights and privileges granted and conveyed to them by Brown on October 17th, 1910, and of which grant and conveyance appellant had notice and knowledge over sixteen years before the commencement of this action, and during the enjoyment of which rights and privileges these appellees have built up the great mining industry described in the amended complaint, would not only work an irreparable injury upon them, but would be tantamount to a cancellation of the Brown indenture in a suit commenced by the appellant for that purpose, after his long period of acquiescence in the enjoyment by appellees of such rights and privileges, and would result in a confiscation of the properties of appellees in the County of Shoshone, Idaho, since there is dependent upon the determina-

tion of this action the most vital question as to whether they shall continue to enjoy the benefits guaranteed to them by the Brown indenture and by more than two hundred similar indentures, or be subjected to the blighting and ruinous consequences of hundreds of actions based upon exorbitant and extortionate demands for money.

There would be no difference, in effect, between the suspension of the mining and milling operations of these appellees by the injunctive decree of a court of equity and the closing of such mining and milling operations in satisfaction of claims, the aggregate amount of which would cripple, if not exhaust, the treasury of the United States.

In affirming a judgment of the lower court in dismissing the bill, Mr. Justice White, who wrote the unanimous opinion of the Supreme Court of the United States in Penn. Mutual Life Insurance Co. v. City of Austin, 168 U. S. 685, in an exhaustive and conclusive manner reviewed the former decisions of that Court in its unvarying enforcement of the *doctrine of laches,* as follows:

> "In Speidel v. Henrici, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Gray:
>
> 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them.' 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always dis-

countenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'

In Galliher v. Cadwell, 145 U. S. 368, 371, speaking through Mr. Justice Brewer, it was said:

'The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all.'

In Hammond v. Hopkins, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.'

In Willard v. Woods, 164 U. S. 502, 524, the court said:

'But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. Sullivan v. Portland & Kennebec Railroad, 94 U. S. 806, 811; Lansdale v. Smith, 106 U. S. 391, 394; Badger v. Badger, 2 Wall. 87, 95.'

In Lane & Bodley Co. v. Locke, 150 U. S. 193, and Mackall v. Casilear, 137 U. S. 566, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary."

In Upton, Assignee, v. Tribilcock, 91 U. S. 45, 55, the Supreme Court said:

"Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. Beckford v. Wade, 17 Ves. 87-97; Jones v. Tuberville, 2 Ves. Jr. 11."

In Hays v. Port of Seattle, 251 U. S. 233, on page 239 the Supreme Court said:

"But in the equity practice of the courts of the United States (excepted from the Conformity Act, see Rev. Stats., Sections 913-914) laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance."

In Barnette v. Wells Fargo Nat. Bank, 270 U. S. 438, the Supreme Court, in affirming the decree of this Court which reversed a decree of the District Court, in a suit

brought to set aside a deed upon the ground of duress, where the plaintiff had delayed for more than three years, said:

> "In that situation she was subject to the requirement of equity that an election to disaffirm and to recall the legal consequences of an act which has operated to alter legal rights by transferring them to others, must be exercised promptly. Andrews v. Connolly and other cases cited, supra, show how this requirement is applied in cases of duress. The principle has a like application where the right is founded on fraud. Upton, Assignee, v. Tribilcock, 91 U. S. 45, 54, 55; Wheeler v. McNeil, 101 Fed. 685; Blank v. Aronson, 187 Fed. 241."

In Ancient Egyptian Order v. Michaux, 279 U. S. 737, the Supreme Court of the United States on June 3d, 1929, rendered a decision upholding and enforcing the doctrine of laches which had prevailed in that Court for ages. That case went to the Supreme Court of the United States on Certiorari, and that Court reversed the decree of the Supreme Court of Texas for refusing to hold that the plaintiffs were barred from the relief sought on account of their acquiescence and laches.

One of the conclusions of the State Court was:

> "The plaintiff, the plaintiff-intervenor, and the other plaintiff-intervenors herein have not been guilty of such laches or delay, or acquiescence as to defeat their right to the issuance of the injunction."

In passing upon this matter the Supreme Court of the United States had this to say on page 746:

> "That matter is whether there was acquiescence or laches on the part of the white order. The state court held there was neither. If there was either, the white

order was without any right to object to the use which it was seeking to restrain and the negro order was entitled to continue that use in virtue of its incorporation under the Act of Congress.

An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it."

In this action the record discloses beyond controversy that appellant is barred by his delay, acquiescence and laches.

The Supreme Court of the United States further said:

"Thus it is established that from the beginning the white order had knowledge of the existence and imitative acts and practices of the negro order. In addition, the evidence indubitably shows that with such knowledge the white order silently stood by for many years while the negro order was continuing its imitative acts and practices and was establishing new lodges, enlarging its membership, acquiring real property in its corporate name, and investing substantial sums in the copied paraphernalia, regalia and emblems. * * * * *

The effect on the negro order of the silence and apparent acquiescence of the white order is reflected in the fact that when this suit was brought the former had 76 local lodges, approximately 9,000 members and real and personal property valued at approximately $600,000 which was held and used for fraternal and charitable purposes."

The effect of the acquiescence and laches of the appellant, who had notice and knowledge of the Brown indenture as early as May, 1911, is reflected in the allegation of the amended complaint that the business and mining

operations of the appellees "has now become the principle industry of Shoshone County, in the Coeur d'Alene Mining District Idaho;".

If the Supreme Court of the United States would protect an organization that had accumulated a property valued at approximately $600,000, should not this Court protect the operations of these appellees that have created the principal industry in the County of Shoshone, Idaho, and enabled them to distribute millions of dollars for wages, supplies, equipment, freight, treatment and dividends, and to launch upon the channels of industry, trade and commerce in the United States millions of newly created wealth; operations authorized and protected by the Brown indenture which conveys to appellees the unhampered right to pursue such operations and makes the lands claimed by the appellant subject to all the consequences of all such operations?

As decisive authority of the right and power of this Court to affirm the judgment of the District Court dismissing this action, there is submitted the following conclusive language of the Supreme Court of the United States:

> "What we have said of the evidence demonstrates, as we think, not only that there was obvious and long continued laches on the part of the white order, but also that the circumstances were such that its laches barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order. * * *
>
> Decree reversed." (Pages 748, 749.)

TRIAL BEFORE THE DISTRICT COURT

At the trial at the November 1929 term of the District

Court, on the 10th day of December, A. D. 1929, Mr. Merritt on behalf of plaintiff, appellant herein, made certain offers of proof (R. p. 74.), to which defendants, appellees herein, made the following objections (R. p. 87.):

"MR. BEALE: At this time the Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, defendants in this action No. 1004, object, and each of them objects to all the offers of proof of the plaintiff in this action and to each and every part thereof for the reason that all of said offers of proof are, and each and every part thereof is incompetent and immaterial and should not be received in evidence or in testimony in this action in proof of any of the allegations, matters and things alleged in the amended complaint of the plaintiff, Christ Luama, in this action, since all of said offers of proof are, and each and every part thereof is insufficient to prove any of the allegations, matters and things alleged in said amended complaint, and insufficient to prove a case for the Court in this action, or a case against said defendants or against any of them, and all of said offers of proof fail, and each and every part thereof fails to prove a sufficient case for the Court in this action, or a sufficient case against said defendants or against any of them.

Said defendants object and each of them objects to the patent from the United States of America, mentioned in said offers of proof, as incompetent and immaterial, and to all of the deeds and the records thereof, mentioned in said offers of proof, as incompetent and immaterial, and to all of the portions and parts of said offers of proof relative to the damage of said plaintiff or of any of his property, to the ownership, title and possession of said plaintiff to the lands and premises,

mentioned and described in said amended complaint, to the damage or depreciation of said lands and premises or of any part thereof, or the productivity or non-productivity thereof, to the character of said lands and premises, to the condition of the soil thereof, to the improvements thereon, to the crops growing on said lands and premises or on any part thereof or that may have grown thereon at any time, to the market value of said crops or of any of them, to the loss or damage of said crops or of any of them, to the overflow of said lands and premises at any time by the water of the Coeur d'Alene River, or at all, to the deposit of mud, slimes, tailings, debris, deleterious and poisonous substances or of any thing else on said lands and premises or on any part thereof, to the deposit on said lands and premises or on any part thereof of anything from any of the mills and concentrators of said defendants or of any of them, to the character of anything deposited upon said lands and premises or upon any part of them, to anything dumped into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and their tributaries or dumped at all by said defendants in the operation of their mills and concentrators or of anything else, or in the milling of ore from the mines or from anything else of said defendants or of any of them, or at all, to where the tailings, debris, slimes, deleterious and poisonous substances, mentioned in said offers of proof, came from, to who produced them, to the mills and concentrators and operations thereof, to who operated them, to all operations of said defendants or of any of them, to all matters and things that refer to said plaintiff, said lands and premises, all deposits thereon and overflows thereof, and all crops of every character, and to all acts, matters and things on the part of said defendants or of any of them, mentioned in said offers of proof, as

incompetent and immaterial, and in this connection said defendants direct the attention of this Court to the fact that it has been held and decided by this Court that the instrument dated the 17th day of October, A. D. 1910, mentioned and referred to in said offers of proof, a copy of which is marked Exhibit "A" and made a part of the answer of said defendants, is an easement and release running with the said lands and premises, and that said lands and premises are subject to and bound by said instrument and all of its terms, provisions and covenants, and that said instrument released and releases said defendants Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company and each of them from all acts and consequences of all acts, mentioned and referred to in said offers of proof, on their part, or on the part of any of them, and from all acts and consequences thereof with which said defendants are or any of them is charged in said amended complaint, and from all damages referred to in said offers of proof, and from all damages resulting from all acts and things with which the said defendants and each of them are charged in said offers of proof and in said amended complaint, and from all damages resulting from all mining and milling operations on the part of said defendants Bunker Hill and Sullivan Mining and Concentrating Company, Federal Mining and Smelting Company and Hecla Mining Company, and on the part of any of them, and from all damages resulting from the use of the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the Coeur d'Alene River in all such operations, and from all damages resulting from the dumping of all tailings, waste material and debris, that may have resulted from such mining and milling operations, into

the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the Coeur d'Alene River, or elsewhere, and from all damages resulting from the transportation and carrying away of all such tailings, waste material and debris by the waters of the South Fork of the Coeur d'Alene River and its tributaries and by the waters of the Coeur d'Alene River, and from all damages resulting from the depositing of such tailings, waste material and debris upon said lands and premises or upon any part thereof, and from all damages resulting from all past and future mining and milling operations of said defendants and of each of them, and from all damages resulting from the past and future use by said defendants and each of them of the waters of the South Fork of the Coeur d'Alene River and its tributaries and of the waters of the Coeur d'Alene River in all such past and future mining and milling operations, and from all damages resulting from all dumping of tailings, waste material and debris, resulting from such past and future operations by said defendants and each of them, into said waters, and from all damages resulting from the transportation and carrying away by said waters of said tailings, waste material and debris, and from all damages resulting from all past and future depositing of said tailings, waste material and debris upon said lands and premises or upon any part thereof, and from all damages to said lands and premises and to each and every part thereof, and from all damages to the lands and premises and the crops, horses and cattle, mentioned and referred to in said offers of proof, and from all damages to said plaintiff mentioned in said offers of proof and in said amended complaint.

Said defendants object and each of them objects to each and every part of said offers of proof relative to

horses and cattle, as incompetent, immaterial and not responsive to any issue or issues in this action.

Said defendants object and each of them objects to each and every part of said offers of proof relative to a concert of action and accord as incompetent, immaterial and not responsive to any issue or issues in this action, and as too remote, uncertain, indefinite, and for the reason that there are no facts pleaded in said amended complaint showing concert of action or accord on the part of said defendants or on the part of any of them.

Said defendants object and each of them objects to each and every part of said offers of proof relative to the dams mentioned therein, as incompetent, immaterial and not responsive to any issue or issues in this action, and for the further reason that all such matters and things relative to said dams, mentioned in said offers of proof, are barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919.

Said defendants object to and each of them objects to each and every part of said offers of proof relative to the agents, attorneys and employees of said defendants, or to any of them, to what they did or said or protested, to whom they said or protested anything whatever, to anything they or any of them said to the County Commissioners or taxing authorities of Kootenai County, Idaho, or to any of them, or said or protested to or requested of any Attorney General of the State of Idaho, or to any one or at all, concerning or about any tax matter whatever or any assessment or taxation or any assessment or taxing of said instrument or anything else, or to anything said agents, attorneys and employees or any of them said or did at any time or place or at all as incompetent, immaterial, hear-

say, indefinite, uncertain, not the best evidence, and as barred and prohibited by the provision of Section 7974 of the Code of Civil Procedure of the Idaho Compiled Statutes 1919, and as coming within the inhibition and prohibition of the Statute of Frauds of Idaho, and as not constituting any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants, or any cancellation or forfeiture of said instrument or any of its terms, provisions or covenants by said defendants or by any of them, or any cancellation or forfeiture of any right or privilege of said defendants or of any of them under and by virtue of said instrument and its terms, provisions and covenants, and as not showing that either said plaintiff or any of his predecessors in interest in said lands and premises ever heard of or ever acted upon anything said agents, attorneys and employees or any of them ever did or said or protested or requested as mentioned in said offers of proof, or at all."

Actuated by the purpose to advise fully the trial court and to meet every item and phase of appellant's offers of proof, appellees submitted at length and in detail their objections thereto, and quote in full herein such objections for the convenience of this Court and in support of their contention that those objections were, without doubt or controversy, properly sustained by the District Court.

The District Court having held that the Brown indenture permitted the appellees to perform all acts, with which they are charged in the amended complaint, and released them from all consequences and damages claimed by the appellant, and that all of the alleged properties of the appellant were, by the terms, provisions and covenants of such indenture, made subject to and charged with all such

acts, consequences and damages, it must follow that all offers of proof relative to such properties, acts, consequences and damages were both incompetent and immaterial, and this is particularly true when it is remembered that the Brown indenture was held by District Judge Dietrich in the Polak case to be a release and easement preventing the owner of the property claimed by appellant from asserting such a claim as is involved in this action, and that this Court in the Polak case affirmed such holding of Judge Dietrich, and such holdings apply to and include the claim asserted by appellant in this action.

Notwithstanding it is alleged in the amended complaint (R. p. 24.) that it was "the excessive overflow in the winter of 1917 and January 1918," that "so weakened and impaired" the "low or meadow land", that such land, which before such excessive overflow produced "an average of three tons of timothy hay per acre," and "that after the high waters of December 1917, and January 1918, the plaintiff received and produced less than one ton of hay per acre on the same lands," (against which excessive overflow and all consequences thereof appellees are protected by the terms, provisions and covenants of the Brown indenture,) in the offers of proof at the trial no mention was made of the excessive overflow or of any weakening or impairment of such low or meadow land or failure of crop production thereon on account of such excessive overflow. But instead in such offers of proof an attempt was made to switch to four causes of action upon suggested overflows of such land during the years 1924, 1925, 1926 and 1927, against which overflows and all damages resulting therefrom appellees are also protected

by the terms, provisions and covenants of the Brown indenture.

It is too plain for argument that it was the duty of the District Court to sustain the objections to such offers of proof not only for the reason the appellees were protected against them by the Brown indenture but for the further reason that the trial court could not permit the appellant to switch his cause of action based upon the alleged excessive overflow, to four different causes of action, not pleaded in the amended complaint, based upon four different overflows, one in 1924, one in 1925, one in 1926 and one in 1927. (R. p. 81.)

No causes of action having been alleged in the amended complaint relative to overflows during the years 1924, 1925, 1926 and 1927, no opportunity was afforded appellees to plead to such causes of action, and at the trial no evidence could have been properly or legally admitted relative to these causes of action.

If such causes of action existed they should have been presented separately in the amended complaint.

In Alabama Great Southern R. Co. v. Shahan, 22 So. 509, will be found the following language in the syllabus, to-wit:

> "In an action for injuries resulting from the negligent obstruction of defendant's culvert, a count which avers injuries from several distinct overflows is bad, as improperly joining separate and distinct causes of action."

In the body of the opinion the court said:

> "We are of the opinion, however, that each of these counts were subject to demurrer upon another ground.

Each count avers injury resulting from an overflow in March and an overflow in August, 1891, and separate overflows in February, March and August, 1892. These were separate and distinct torts inflicting separate and distinct injuries, each furnishing a separate and distinct cause of action, and to which there may be separate and different defenses. All these could be joined properly in one complaint, but should be presented in different counts. It is not permissible to unite in one count several torts, constituting distinct and separate causes of action. The grounds of demurrer to these counts raised this objection and should have been sustained." (Reversed.)

In the offers of proof will be found a statement that 36 head of cattle and some horses were pastured on the bottom lands in 1923 and that none of them died or were made sick from eating vegetation growing on such lands and that they were kept in good healthy condition; and the further statement that in 1928 three of plaintiff's horses were taken sick and died immediately after feeding for two or three days on vegetation growing on such bottom lands; that one died in May, one in July and the third in September, 1928. (R. p. 79.)

It will be noted that of the 36 head of cattle and the horses that were pastured on the bottom lands in 1923 none died or were made sick from eating vegetation growing on such lands. It will be further noted that it is not stated that the three horses that were taken sick and died in 1928 were sickened or died *from* feeding on the vegetation growing on such bottom lands but *after* feeding on such vegetation. It is not claimed that such vegetation sickened or killed these horses. Nor does it show what

were the dates of the two or three days these three horses were feeding on the vegetation growing on these bottom lands, or that these horses were ever on the lands prior to the commencement of this action. Nor does it appear that these bottom lands were ever overflowed. A dozen different things might have caused the death of one of these horses in May, the death of another in July and the death of the third in September, 1928, long after they had been feeding for two or three days on such vegetation.

Appellees objected to this uncertain and meaningless offer of proof as incompetent, immaterial and not responsive to any issue or issues in this action. (R. p. 92.)

There is absolutely no allegation or reference in the amended complaint as to any of such cattle or horses. There is no prayer for judgment in the amended complaint for damages on account of the sickness or death of any such cattle or horses. Nor does appellant anywhere in his offers of proof make any claim for damages on account of the sickness or death of any such cattle or horses.

Furthermore these appellees never had any opportunity to test or plead to any allegations relative to such cattle and horses.

Under no rule of pleading or evidence could the District Court have admitted any evidence relative to such cattle or horses.

There being no issue as to these cattle and horses, under the first rule of evidence the offered proof as to them could not be received.

Mr. Greenleaf, in his work on Evidence, in Section 51 of Vol. I, stated the rule as follows:

"And it is an established rule, which we state as the

FIRST RULE, governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue."

Circuit Judge Day, in the opinion of the Circuit Court of Appeals for the Sixth Circuit, in Ferguson Contracting Co. v. Manhattan Trust Co. 118 Fed. 791, 795, affirming the ruling of the Circuit Court in refusing to receive testimony upon a matter not set up in the cross bill, said:

"It is elementary law that the proof and the allegations must correspond."

The following test will be found on page 537 of 22 Enc. Pl. & Prac.:

"REASON AND OBJECT OF RULE.---The rule that the allegations and proof must correspond is intended to answer the double purpose of distinctly and specifically advising the opposite party of what he is called upon to answer, so as to enable him properly to make out his case and to prevent his being taken by surprise in the testimony at the trial, and of preserving an unerring record of the cause of action as a protection against another proceeding based upon the same cause."

However, viewed from every angle, appellees by the terms, provisions and covenants of the Brown indenture are protected against and released from any recovery on account of the sickness and death of any cattle or horses caused from pasturing upon any of the lands, claimed by the appellant, upon which the waters of the Coeur d'Alene River may have transported and deposited any tailings, waste material and debris produced by the mining and milling operations of the appellees.

There were inserted in the offers of proof certain statements that at the date of the Brown indenture the ap-

pellees and others were maintaining, and prior thereto had maintained two impounding dams on the Coeur d'Alene River for the purpose of impounding and holding tailings, debris and poisonous substances dumped into the Coeur d'Alene River and tributaries and that such dams did impound such tailings, debris and poisonous substances; that in the month of December 1917 and in the month of January 1918 said dams were carried away and destroyed by the waters of the Coeur d'Alene River; that a large portion of the tailings, debris and poisonous substances impounded by said dams was washed down the Coeur d'Alene River and deposited in the bed and channel thereof, and that the appellees and others failed, neglected and refused to reconstruct such dams. (R. p. 81.)

To each and every part of the offers of proof relative to these dams appellees objected as incompetent, immaterial and not responsive to any issue or issues in this action, and for the further reason that all matters and things relative to such dams were barred by the provision of Section 6617 of the Code of Civil Procedure of Idaho Compiled Statutes 1919. (R. p. 92.)

It will be noted that it is not claimed in the offers of proof that any of the tailings, debris or poisonous substances that may have been impounded in such dams was ever deposited on the lands claimed by the appellant, or that such lands or any properties of appellant were injured on account of these dams, on account of their destruction, or on account of anything washed out of the same.

There is not a word or syllable in the amended complaint relative to these dams.

If appellant had alleged in the amended complaint a cause of action for injury to his lands and properties on account of the breaking of these dams and of the depositing on such lands and property of any tailings, debris and poisonous substance that had washed out of such dams when the same were destroyed in December 1917 and January 1918, such cause of action would have been barred by the statute of limitations. The appellant not having alleged anything in the amended complaint relative to these dams, not having complained of any damage to any of his property on account of anything that was washed out of such dams when they were destroyed in December 1917 and January 1918, and being confronted with the fact that any cause of action alleged in the amended complaint based upon injury to his lands or property on account of the destruction of such dams and the washing of anything out of them by the waters of the Coeur d'Alene River in December 1917 and January 1918, would be barred by the statute of limitation, no possible excuse can be offered for injecting into the offers of proof the incompetent, irrelevant, unpleaded matter relative to such dams.

The inexcusable incorporation of such matter into the offers of proof is further emphasized by the fact that the damages claimed by the appellant in his offers of proof are predicated on loss of crops for the years 1924, 1925, 1926 and 1927, and depreciation of lands involved in this action by the acts of appellees depositing tailings, debris, deleterious and poisonous substances from their mills and concentrators into the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and

along the banks thereof during the years 1924, 1925, 1926 and 1927. (R. p. 80.)

Properly and rightly the District Court refused to receive any evidence relative to these dams, a matter not in issue and a matter upon which appellant makes no claim for damages.

The above decision written by Circuit Judge Day and the text in Greenleaf and 22 Enc. Pl. & Prac. supra, are conclusive upon the proposition that the trial court followed the rule of evidence and decision in not admitting the offers of proof as to such dams.

Furthermore, there is no allegation in the amended complaint and nothing in the offers of proof showing that Brown knew anything about the dams, or that the dams in any manner entered into the execution of his indenture, or that appellees ever promised Brown to maintain such dams, or that the appellant considered the dams when he claims to have purchased the Brown property, and if the same had appeared in the amended complaint, in the offers of proof or in the record, no testimony could have been admitted relative thereto under the ancient rule of evidence which would not permit parol testimony to be received to contradict, vary, add to, or subtract from the terms of the Brown indenture.

Under the circumstances should not these appellees be permitted to state the fact that they never constructed or maintained any dam in the Coeur d'Alene River?

While it is not claimed in the offers of proof that any of such tailings, waste material and debris that might have been carried and transported out of the dams by the waters of the Coeur d'Alene River were ever deposited

on such lands, it would be immaterial if such tailings, waste material and debris had been deposited on such lands, as it is specifically granted and covenanted in the Brown indenture that such lands are forever subject to and charged with the right and privilege of appellees of having all such tailings, waste material and debris transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

And it does not make any difference whether in such transportation and carrying away of such tailings, waste material and debris, such waters transported and carried them into a dam and then transported and carried them out of a dam, or transported and carried them away without any dam.

There is absolutely no limitation in the Brown indenture as to how or in what manner such tailings, waste material and debris shall be transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries, and there is no authority or power in the courts to insert or interpolate any limitation into the Brown indenture.

In French v. Shoemaker, 14 Wall. 314, 335, the Supreme Court of the United States said:

> "Parties who execute contracts must expect that they will be enforced when due application for that purpose is made to a court of justice, nor can they reasonably hope that courts of justice will reopen matters which they have voluntarily and understandingly closed."

In Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462, the Supreme Court of the United States said:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The above language in the Coos County case has been quoted and approved by this Court.

There are certain statements in the offers of proof (R. p. 85.) to the effect that the agents, attorneys and employees of defendants (appellees) protested against the instrument (the Brown indenture) dated the 17th day of October, A. D. 1910, marked Exhibit "A" and made a part of the answer of said defendants, being listed for taxation or assessment and taxed to said defendants; that said attorneys, agents and employees appeared, a number of times, before the County Commissioners and taxing authorities of Kootenai County, Idaho, and protested against the same being assessed and taxed against said defendants, and also appeared before the Attorney General of the State of Idaho and requested said Attorney General to notify the taxing authorities of Kootenai County, Idaho, that same should not be taxed to said defendants; that after the commencement of this action and some twelve or fifteen other actions involving the same questions, and like instruments, and damage to lands and crops on the Coeur d'Alene River, as herein involved, the Assessor of Kootenai County, Idaho, listed for taxation said instrument and all other like instruments, and there-

upon a tax was levied and assessed upon said instruments in the sum of $3220.78; that said tax was paid on the 12th day of December, 1928; that for the year 1929 a tax was levied and assessed upon said instruments in the sum of $3386.47, and that the tax paid on the 12th day of December, 1928 was the first and only assessment and tax that has been paid on said instruments. Such statements were hereinbefore summarized and reviewed.

In addition to their objection (R. p. 87.) that each and every part of the above offers of proof of appellant was incompetent and immaterial and could not be received in evidence or in testimony in this action in proof of any of the allegations, matters and things alleged in the amended complaint of the plaintiff (appellant) in this action, these appellees further objected as follows: (R. p. 93.)

> "Said defendants object to and each of them objects to each and every part of said offers of proof relative to the agents, attorneys and employees of said defendants, or to any of them, to what they did or said or protested, to whom they said or protested anything whatever, to anything they or any of them said to the County Commissioners or taxing authorities of Kootenai County, Idaho, or to any of them, or said or protested to or requested of any Attorney General of the State of Idaho, or to any one or at all, concerning or about any tax matter whatever or any assessment or taxation or any assessment or taxing of said instrument or anything else, or to anything said agents, attorneys and employees or any of them said or did at any time or place or at all as incompetent, immaterial, hearsay, indefinite, uncertain, not the best evidence, and as barred and prohibited by the provision of Section 7974 of the Code of Civil Procedure of the Idaho Compiled Statutes 1919, and as

coming within the inhibition and prohibition of the Statute of Frauds of Idaho, and as not constituting any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants, or any cancellation or forfeiture of said instrument or of any of its terms, provisions or covenants by said defendants or by any of them, or any cancellation or forfeiture of any right or privilege of said defendants or of any of them under and by virtue of said instrument and its terms, provisions and covenants, and as not showing that either said plaintiff or any of his predecessors in interest in said lands and premises ever heard of or ever acted upon anything said agents, attorneys and employees or any of them ever did or said or protested or requested as mentioned in said offers of proof, or at all."

It is inconceivable for what purpose, or upon what theory, or under what rule of pleading, practice or evidence such offers of proof were made.

There is not any allegation or reference in the amended complaint as to the levy or assessment or payment or nonpayment of any tax on the Brown indenture, or on any instrument or instruments referred to in such offers of proof, or any allegation in the amended complaint as to any protest whatever of any agent, attorney or employee of any of these appellees.

It will be noted that it is not claimed that any of such agents, attorneys or employees ever had any authority whatever to make such protest or any protest to the County Commissioners or taxing authorities of Kootenai County, Idaho, or any request of the Attorney General of Idaho.

It will be further noted that it is not claimed that those

protests were or any of them was in writing, or that the Board of County Commissioners or Assessor ever acted upon any of them, or that any record was ever made of any action upon those protests by such Board of County Commissioners or such Assessor, or that the Attorney General of Idaho ever gave any consideration to or ever acted upon said request, or that any dates were fixed when such protests were made, or any date mentioned when the request was made.

Nor is it claimed that the appellees ever protested against any tax that had been levied and assessed upon the Brown indenture or on any of the instruments mentioned in the offers of proof, or ever refused to pay any tax levied and assessed on such indenture or on any of such instruments.

In fact, it is stated that the tax levied and assessed on such instruments was paid.

It is most significant that appellant did not claim that he or any of his predecessors in interest ever heard of or ever acted upon any of said protests or upon said request or upon anything such agents, attorneys and employees or any of them ever did or said or protested or requested.

Had appellees protested against the levy and assessment of a tax on the Brown indenture it would be impossible to construe such protest into a loss or forfeiture of their rights and privileges under it, or a cancellation of such indenture or of any of its terms, provisions and covenants.

If all the property owners in the United States who have protested against the levy and assessment of taxes upon their properties had thereby lost and forfeited their

rights and privileges in or cancelled their deeds and titles to their properties, a very great many property rights and titles in this country would be in a condition of chaos.

PROTESTS VOID

Appellees cannot be deprived of their rights, privileges and protection guaranteed by the terms, provisions and covenants of the Brown indenture by any of said *void* protests.

Appellees could not forfeit or surrender their rights, privileges and protection under and by virtue of the Brown indenture, otherwise than by a conveyance or instrument in writing subscribed by them.

The rights, privileges and protection of the appellees under and by virtue of the Brown indenture could not be forfeited or surrendered by any agent, attorney or employee of the appellees, otherwise than by a conveyance or instrument in writing subscribed by such an agent, attorney or employee who had been authorized by the appellees in writing to do so.

Such is the law of Idaho.

Such is the law of Idaho as declared by the Supreme Court of Idaho and as declared by this Honorable Court.

Section 7974 of Idaho Compiled Statutes 1919 is as follows:

> "Sec. 7974. (6007) Transfers of real property to be in writing. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation

of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. (R. S. Sec. 667.)"

In interpreting and applying the above section the Supreme Court of Idaho in Schulz v. Hansing, 36 Idaho, 121, 125, used this conclusive language:

"Respondent's right to recover, if any exists, rests solely upon an alleged oral agreement for the transfer to appellant of an interest in real property, which oral agreement was void for the reason that it was in contravention of C. S., sec. 7974, the same not being evidenced by an instrument in writing or delivery of possession of the real property. The purported sale from Smith to respondent was void under the provisions of sec. 7974, supra, for the reason that it was not evidenced by any instrument in writing as therein provided. The mere giving of a check as evidence of good faith is not sufficient to pass title to real estate, under the laws of this state. There must be a conveyance or other instrument in writing subscribed by the party sought to be charged or his lawfully authorized agent, as was said in the recent case of Oylear v. Oylear, 35 Ida. 372, 208 Pac. 857: 'We are not disposed to hold under any view of the law that title to real estate may be transferred by word of mouth and without any written instrument purporting to convey such property, or any change of possession.'

Respondent sought to sell by word of mouth his alleged interest claimed by him in the Foren land. This he clearly could not do.

From what has been said it follows that the court erred in overruling objections to the admission of any

evidence on behalf of respondent for the purpose of showing an oral agreement between appellant and respondent."

In Lawyer v. Post, 109 Fed. 512, which involved an alleged oral change of a written agreement and a verbal agreement to sell and convey real property, this Court affirmed the judgment of dismissal of the Circuit Court of the United States for the Northern Division of the District of Idaho, and in its opinion interpreted and applied section 6007, Rev. St. Idaho, which is the same as section 7974, supra, in the following language:

"Assuming that the evidence establishes that the defendant Frederick Post verbally agreed to sell and convey such other and additional property, and that he verbally gave an additional extension of the time within which he would sell and convey both that referred to in the written option and such other and additional property, such oral agreement must be held to be void, under the provisions of section 6007, Rev. St. Idaho, which declares:

'No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.' "

Thus it will be seen by the provisions of the statute of Idaho, by the decision of the Supreme Court of Idaho and by the decision of this Court interpreting such statute, that the Brown indenture could not be "surrendered" or

"declared" away by any protest or request of appellees, that was not in writing, or by anything they may have said in respect to such indenture, or by any protest or request of any agent, attorney or employee of appellees, that was not in writing, and without written authority from appellees, or by anything such agent, attorney or employee may have said in respect to such indenture.

Out of the hundreds of additional decisions that could be cited that uphold the ruling of the District Court sustaining the objections of appellees to the offers of proof of appellant as to such agents, attorneys and employees and the assessment and taxation of the Brown indenture, only one thereof will be presented in this brief to this Court in addition to those quoted.

In Reid v. Diamond Plate-Glass Co., 85 Fed. 193, 195, the Circuit Court of Appeals for the Sixth Circuit, presided over by Taft and Lurton, Circuit Judges, and Clark, District Judge, which involved the exclusion of parol evidence relative to a written contract, required to be in writing by the statute of frauds of Michigan, will be found the following language which upholds beyond controversy that the offers of proof of plaintiff (appellant) relative to what the agents, attorneys and employees of defendants (appellees) protested, requested or said in relation to the Brown indenture were inadmissible, to-wit:

> "For the purpose of disposing of the question presented by the assignment of error just referred to, we are not concerned with the statute of frauds, further than to say that it could not be doubted, and is conceded, that the contract was one required by section 6186 of the Michigan statute to be in writing. It is to be further remarked that the contract was not only required to be,

but was in fact, put in writing. The contract is complete in itself, clear and unambiguous in its terms and provisions, and undoubtedly represents the deliberate engagement of the parties. Apart from any particular question of the statute of frauds, there is an ancient rule of evidence, of wide application, resting upon substantially the same principle, as the statute of frauds, which does not permit parol testimony to be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. 2 Jones, Ev. 437, 438, 446; I Greenl. Ev. Sec. 275; 2 Tayl. Ev. Secs. 1132, 1133. The rule is laid down by the author of the work last cited as follows:

'Bearing the above principles in mind, the leading general rule respecting the admissibility of extrinsic evidence to affect what is in writing is that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. The common-law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls 'the uncertain testimony of slippery memory.' When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after or at the time of the completion of the contract, will be rejected, because such evidence, while

deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong. Apart from all considerations of convenience, positive enactment has imposed the same rule in several cases. It has, by requiring certain transactions to be evidenced by writing,---as, for instance, wills, contracts within the statute of frauds, and the like,---rigidly excluded all parol testimony tending to vary the terms contained in the written instrument. The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in any degree is, to the like extent, to repeal the particular act which renders the writing necessary. The term 'written instrument,' for this purpose, includes, not only records, deeds, wills, and other instruments required by statute or common law to be in writing, but every document which contains the terms of a contract between different parties, and is designed to be the repository and evidence of their final intentions.' "

* * * * * * *

" 'The rule is well settled that when a contract has been reduced into writing, in plain and unambiguous terms, without any uncertainty as to the object or undertaking of the parties, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was embraced in such written contract. And in such case, in the language of Lord Denman, 5 Barn. & Adol. 64, 'verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in the state of prep-

aration, so as to add to or subtract from, or in any manner to vary or qualify, the written contract.' The meaning and intention of the parties, in all such cases, must be ascertained and declared by the court from what is written in the instrument; and no extrinsic evidence of the intention of the parties from their declarations or conversations, whether at the time of executing the instrument, or before or after that time, is admissible.' "

It is believed that the following language of this Honorable Court as to the appeal in Lawyer v. Post, supra, is applicable to the appeal in this action, to-wit:

"There is, in our opinion, no merit in this appeal."

Furthermore, it was the duty of the District Court, both under the statute of Idaho and by reason of the decisions of the Supreme Court of that State, to sustain the objections of the appellees to the offers of proof as to horses and cattle, dams, and protests of agents, attorneys and employees of appellees upon the ground that there were no issues in this action concerning horses or cattle, or dams, or protests of agents or attorneys or employees of appellees, and that would be true even though there had not been any objections or answer on the part of the appellees.

It is provided in Section 6829 of Idaho Compiled Statutes as follows:

"Sec. 6829. (4353) Extent of relief. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint embraced within the issue. (R. S. Sec. 4353.)"

In interpreting the language in that section, which was

copied from Section 4353 Revised Codes of Idaho, the Supreme Court in Brunzell v. Stevenson, 30 Ida. 202, 205, said:

> "Assignment numbered 2 pertains to the appointment of a water-master." * * *
>
> "In this action, however, neither party petitioned for such appointment. The court cannot grant relief not embraced within the issues (sec. 4353, Rev. Codes; Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049), and therefore its action in directing the appointment of a water-master was erroneous."

Hence in this action, if the District Court had received the offered proofs upon those matters not in issue, its action would have been erroneous.

THE BROWN INDENTURE GRANTS AND CONVEYS AN INTEREST AND ESTATE IN THE LANDS CLAIMED BY APPELLANT

In 19 Corpus Juris, 863, will be found the following definition of an easement:

> "It is an incorporeal right---an incorporeal hereditament, and although only an incorporeal right and appurtenant to another, the dominant, tenement, it is yet properly denominated an interest in land which constitutes the servient tenement, and the expression, 'estate or interest in lands,' or 'fee or a freehold estate,' when used in a statute, is broad enough to include such rights."

In Howes v. Barmon, 11 Ida. 64, 69, the Supreme Court of Idaho said:

> "On the other hand, an easement is an interest or estate in real property, and is subject to the operation

of the statute of frauds. (Rev. Stats., sec. 6007; 14 Cyc. 1144; Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497, and note; Clark v. Glidden, supra; Jones on Easements, sec. 65.)"

In Humphrey v. Krutz, 137 Pac. 806, 808, the Supreme Court of Washington said:

"An easement, although an incorporeal right, is an interest in land. Oates v. Town of Headland, 154 Ala. 503, 45 South. 910; Pacific Yacht Club v. Sausalito, etc., Co., 98 Cal. 487, 33 Pac. 322; 14 Cyc. 1139."

In Nellis v. Munson, 15 N. E. Rep. 739, 740, the Court of Appeals of New York said:

" 'Washburn, in discussing the distinction between an easement and a license, says that 'an easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest.' * * * *

It seems to follow, necessarily, from the authorities, that an easement to draw water through pipes over the land of another for the benefit of a dominant tenement, is an interest in lands existing independent of the fee of the land over which it is exercised, and is an estate in land possessed in fee by the owner of the dominant estate. It is an incorporeal hereditament consisting of an estate of inheritance, transferable according to the statute of descents, and comes directly within the meaning of the terms 'fee or freehold estate,' as used in section 137. That it was the intention of the grantor of the easement in question to convey a fee therein, is manifest from the language of the instrument, as it grants and conveys the interest described to the grantee and 'his heirs and assigns,' and is made obligatory upon the grantor and 'her heirs and assigns.' "

In Branson v. Studebaker, 33 N. E. Rep. 98, 103, the Supreme Court of Indiana said:

"A fee may exist in an incorporeal hereditament, and may, of course, under this principle, exist in an easement. (Citations omitted.) The general doctrine stated is recognized in the case of Waterworks Co. v. Burkhart, 41 Ind. 364, and the cases following it. (Citations omitted.) The facts contained in the special verdict make the case a much clearer and plainer one than that of Waterworks Co. v. Burkhart, supra, for here there was an acquisition of title by contract, while in that case the title of the original owner was wrested from him by condemnation proceedings. We do not affirm that the line of cases referred to are precisely in point upon all the questions in this case, but we do affirm that they necessarily, and by clear implication, establish the general principle that a fee may exist in an easement. In Burk v. Simonson, 104 Ind. 173 2 N. E. Rep. 309, and 3 N. E. Rep. 826, the existence of a perpetual right in an easement was clearly recognized. But we cannot, independently of these cases, hold that there may not be a fee in an easement, without, as we have seen, running counter to the elementary principles; nor is there anything novel or strange in the doctrine that there may be a fee in an easement, for an easement is an estate in land. (Citations omitted.) All easements are estates in land. A fee may exist in all estates in land. Therefore a fee may exist in an easement."

Brown, after setting forth in detail the damage he had sustained in the past and would sustain in the future by reason of the past and future mining and milling operations of the appellees, and their use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such operations into such waters, and the

use of such waters in the transportation and carrying away of such tailings, waste material and debris, for a valuable consideration satisfactory to him, and concerning which he has never made any complaint to appellees, granted, bargained, sold, conveyed and confirmed unto the appellees, and to their successors and assigns, the right and privilege to carry on and continue all mining and milling operations in which they may engage in the County of Shoshone and the County of Kootenai, State of Idaho, and the right and privilege of using the waters of such rivers and tributaries in such operations, and the right and privilege of dumping all tailings, waste material and debris that may result from such mining and milling operations into such rivers and tributaries and along their banks, and the right and privilege of having such tailings, waste material and debris transported and carried away by the said waters of said rivers and tributaries, and thereafter in his indenture made his property, and each and every part thereof, mentioned therein, subject to and charged with all such mining and milling operations, both past and future, with such use of said waters in such mining and milling operations and in the dumping of all tailings, waste material and debris resulting from such mining and milling operations into the waters of such rivers and tributaries and along their banks, and with the use of such waters of such rivers and tributaries in the transportation and carrying away of such tailings, waste material and debris.

After such detail and particularity it is inconceivable how he could have more completely subjected his property to or charged the same with the right and privilege in ap-

pellees and their successors and assigns of having such waters transport, carry away and deposit upon his property and every part thereof the tailings, waste material and debris produced by appellees in both their past and future mining and milling operations.

Every act, operation and use of the appellees complained of in the amended complaint was anticipated and provided against in the Brown indenture, and every injury and damage complained of in the amended complaint was acknowledged by Brown in his indenture to have been paid for, and therein he released appellees and their successors and assigns from all such injury and damage.

If the Brown indenture is not to be interpreted and applied as it was interpreted and applied by the District Court, and the appellant is permitted to recover in this action, then there would exist such a condition as portrayed by the Supreme Court of the United States in Upton, Assignee, v. Tribilcock, 91 U. S. 45, to-wit:

> "If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law."

The Supreme Court of California in Coffey v. Superior Court, 82 Pac. 75, 79, defines "Subject to" as follows:

> "To be 'subject to' is 'to become subservient to' or 'subordinate to,' Cent. Dict."

Webster's New International Dictionary defines "Subject" as follows:

> "To make subservient; to submit (a thing or person) to the action or effect (of something);".

The "thing" Brown made "subject to" and "subservient

to" was all the property involved in this action, and the "something", "action and effect", to which such property was made "subject to" and "subservient to", were the waters of the Coeur d'Alene River in overflowing and depositing on such property the tailings, waste material and debris, produced by the duly authorized and permitted mining and milling operations of appellees, while transporting and carrying away such tailings, waste material and debris.

The claim of appellant that the Brown indenture did not grant and convey to appellees the right and privilege of having the tailings, waste material and debris, resulting from their mining and milling operations, deposited upon the property claimed by appellant, in the course of being transported and carried away by the waters of the Coeur d'Alene River, is conclusively answered by the following holding of the Supreme Court of the United States in Sheets v. Selden's Lessee, II Wallace, 177, 187:

> "The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land for which the action is brought, by specific designation and description. Such designation and description, though usual, are not always essential. Land will often pass by other terms. Thus a grant of a messuage or a messuage with the appurtenances will carry the dwelling-house and adjoining buildings, and also its orchard, garden, and curtilage. The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

Thus the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee not merely the building but all the land under the mill and necessary for its use, and commonly used with it. So a conveyance 'of a certain tenement, being one-half of a corn-mill situated,' on a designated lot 'with all the privileges and appurtenances' was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use."

In Meir-Nandorf v. Milner, 34 Idaho, 396, 400, the Supreme Court of Idaho said:

"The first rule of construction to be applied to a written instrument in order to determine what is intended by it is that resort shall be had to the language of the instrument itself, and 'If the expressed meaning is plain on the face of the instrument it will control.' (18 C. J., p. 257, sec. 204b, p. 277, sec. 242e.)"

In Kaleialii v. Sullivan, 242 Fed. 446, 449, this Honorable Court, speaking through Circuit Judge Hunt, said:

"The true principle is to construe the deed according to the intention of the parties as manifested by the entire instrument, even though it may not comport with the language of a particular part of it. The recitals in the deed under examination, and which may be useful to aid us in arriving at the intent, are a kind of explanation by the grantor. The first purpose disclosed by them is 'to provide for' the daughters, so as to prevent inconvenience to them, and also to provide the care of their persons with necessary things, and to provide also for their maintenance. The words used in the recitals are not a necessary part of the deed, but being in the instrument, they afford a clue to the intention of the maker. Washburn on Real Property, Sec. 2351."

In Idaho no particular form of words is necessary to constitute a conveyance.

Section 5373 of Idaho Compiled Statutes 1919 is as follows:

> "Section 5373. (3105) Conveyance: How made. A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. (R. S. Sec. 2920.)"

Section 883 of Devlin on Real Estate, Deeds, Third Edition, Vol. 2, page 1671, is as follows:

> "Sec. 883. How created.---A covenant may be created by any language showing the intention of the parties to bind themselves. No particular form is required, nor is it necessary to use any particular word. A covenant may be created without using the word 'covenant' in the clause containing the stipulation. A covenant may be contained in a recital in the deed, and be as operative as though it was expressed with the other covenants."

In Kelly v. Calhoun, 95 U. S. 710, 713, in which the deed involved was alleged to be defective, the Supreme Court of the United States in affirming the Circuit Court in holding the deed good, had this to say:

> "Instruments like this should be construed, if it can be reasonably done, *ut res magis valeat quam pereat.* It should be the aim of courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual, according to the honest intent of the parties. Roe v. Tranmar, Willes, 682."

The above Latin maxim is defined in Bouvier's Law Dictionary, as follows:

"That the thing may rather have effect than be destroyed."

The Circuit Court of Appeals for the Sixth Circuit in affirming the decree of the District Court in Peters v. M'Laren, 218 Fed. 410, 421, approved the following language in the opinion of the District Court sustaining a deed and dismissing the petition of appellant:

> "It is the aim of the courts to preserve, not to destroy. They should be astute to find means to make acts effectual, according to the honest intent of the parties. Kelly v. Calhoun, 95 U. S. 710, 713, 24 L. Ed. 544. That construction will always be adopted which will accomplish the object for which the instrument was executed."

In Prescott v. White, 32 Am. Dec. 266, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, said:

> "When the use of a thing is granted, every thing is granted by which it may be enjoyed: Pomfret v. Riccroft, 1 Wms. Saund. 323, and note 6."

Applying the above text and decisions, including those of the Supreme Court of the United States, of this Honorable Court, of the Supreme Court of Idaho and of numerous other States, it is believed that no other conclusion can be reached than that: when Brown granted and conveyed to appellees the use of the said waters to transport and carry away their tailings, waste material and debris, and made his property subject to and charged the same with such use, he granted and conveyed to them the use of having such waters overflow and deposit on his property such tailings, waste material and debris.

FINAL ANALYSIS OF BROWN INDENTURE

Brown after asserting his ownership and possession of the property described in his indenture, which is the property claimed by the appellant in this action, set forth his claims therein that by the depreciation in value of such property and the loss of crops and in the disease, sickness, loss and death of certain domestic animals, including horses and cattle, he had been in the past and would be in the future damaged by reason of the past and future mining and milling operations in the Counties of Shoshone and Kootenai, State of Idaho, of the appellees, and by reason of the use of the waters of the Coeur d'Alene River and the South Fork of the Coeur d'Alene River and its tributaries in such mining and milling operations and in the dumping of the tailings, waste material and debris from such mining and milling operations into such waters, and by reason of the use of such waters in the said Counties of Shoshone and Kootenai, State of Idaho, in the transportation and carrying away of the said tailings, waste material and debris from such operations.

After enumerating such claims Brown in consideration of the sum of money mentioned in his indenture, which he acknowledged therein as having been paid to him by the appellees, which payment he acknowledged as full payment and satisfaction of all damages to him, including all damages to said property and each and every part thereof and to all crops and for the loss of all crops and by reason of the sickness, disease, loss and death of domestic animals, including horses and cattle, which he had sustained in the past and which he would sustain in the future by reason

of the said mining and milling operations of the appellees and their use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in said mining and milling operations, and the use of said waters as a dumping ground for the tailings, waste material and debris resulting from such mining and milling operations, and the use of said waters in the said Counties of Shoshone and Kootenai, State of Idaho, in the transportation and carrying away of the tailings, waste material and debris resulting from such operations: granted, bargained, sold, conveyed and confirmed unto the appellees and to their successors and assigns forever, the right and privilege to carry on and continue in the said Counties of Shoshone and Kootenai, State of Idaho, any and all mining and milling operations in which they or any of them may engage in said counties or in either of them, and the right and privilege of dumping any tailings, waste material and debris that may result from such mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries or along the banks thereof, and the right and privilege of having such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries; and by his indenture subjected and charged said property and each and every part thereof with said mining and milling operations of appellees in the past and with the said use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in said operations and in the said transportation and carrying away of

said tailings, waste material and debris by said waters, and also subjected and charged said property and each and every part thereof with all the mining and milling operations in the future of the appellees, their successors and assigns, and with the privilege of dumping the tailings, waste material and debris that may result from such future mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and along the banks thereof, and with the privilege of the use of the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of all said tailings, waste material and debris that may result from all such future mining and milling operations both in the said County of Shoshone and the said County of Kootenai, State of Idaho; and in further consideration of the payment to him of said sum, Brown in his indenture released the appellees and their successors and assigns from all damages and claim of damages in the future on account of any injury or damages to said property and every part thereof, and on account of the loss of and damage to any and all crops upon said property, and on account of the sickness, disease, loss and death of any and all domestic animals on said property, which may be caused by such future mining and milling operations of the appellees and their successors and assigns and by the dumping of such tailings, waste material and debris as may result from said mining and milling operations into the said Coeur d'Alene River, the South Fork of the Coeur d'Alene River

and its tributaries and along the banks thereof, and which may be caused by the use of the said waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in such future mining and milling operations and for the transportation and carrying away of all such tailings, waste material and debris that may result therefrom in the said County of Shoshone and the said County of Kootenai, State of Idaho.

Brown did not stop there but further provided in his indenture that all of the above and foregoing was granted and conveyed and belonged to the appellees and their successors and assigns "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."; and further provided for the appellees and their successors and assigns "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, (including these appellees) their representatives, successors, heirs, executors, administrators and assigns forever."

Brown not only granted and conveyed to appellees and their successors and assigns the right and privilege of having all tailings, waste material and debris produced in all of their mining and milling operations, both in the past and in the future, transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries but went farther and made all of his property, described in his written indenture, subject to and charged with such right and

privilege of having all such tailings, waste material and debris transported and carried away by said waters, and even went farther and granted and conveyed such right and privilege together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to be had and held by appellees and their successors and assigns forever.

That right and privilege to which his property was subjected and with which it was charged included the right and privilege of having all such tailings, waste material and debris deposited upon his lands and property in the course of their being transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries.

The language of the Brown indenture is so plain, clear, certain and unambiguous as to admit of no other interpretation. Even though he had not charged and subjected his property to such right and privilege of transportation and carrying away and had merely granted such right and privilege of transportation and carrying away together with the appurtenances thereunto belonging to be had and held by the appellees and their successors and assigns forever, no other interpretation could have been placed on such a grant and conveyance than that it granted and conveyed the right and privilege of having such waters transport and carry such tailings upon the property of Brown.

It would destroy the purpose, force and effect of the Brown indenture and amount to an accusal of appellees paying money to Brown for no cause or reason whatever

to limit the right and privilege of transporting and carrying away the tailings, waste material and debris to the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries which flow in the channel between their banks and in which channel none of his property was situate.

The mere grant and conveyance to appellees of the right and privilege of having such tailings, waste material and debris confined to such waters as did not overflow the property of Brown, would be a useless and valueless grant and conveyance.

In Scheel v. Alhambra Min. Co., 79 Fed. 821, in which there was involved a strip of land through which a tunnel ran, but which did not include the land at the mouth of the tunnel necessary for a dump and for use in the running and operating of the tunnel, District Judge Hawley held that the deed, which granted, bargained, sold and conveyed the strip of land "together with all and singular the * * * appurtenances thereto belonging.", included the right to dump waste rock at the mouth of the tunnel on the land owned by the grantors, but which was not included in the strip of land mentioned in the deed, as incident and appurtenant to the tunnel constructed through such strip of land, and in the course of his opinion said:

> "Did the right to use the surface ground at the mouth of the tunnel as a dump pass by the conveyance from the plaintiff to the defendant of the tunnel right as an incident or appurtenant to the land conveyed? The deed was a bargain and sale deed. It granted, bargained, sold, and conveyed the premises described in the statement of facts, 'together with all and singular the * * * ap-

purtenances thereto belonging.' The conveyance of the land through which the tunnel runs would be of but little, if any, value without the use of the surface ground at the mouth thereof as a dump. In fact, the tunnel could not be successfully run for the purposes for which it was located and constructed without such right or privilege. A deed in general terms passes everything which is a constituent part of the land granted. Was the right to dump the waste rock on the plaintiff's land an incident or appurtenant to the use and occupancy of the tunnel? The word 'appurtenances,' in common parlance and legal acceptation, is used to signify something belonging to another thing as principal, and which passes as incident to the principal thing. * * *

By implication the grant of such a right carries with it every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, such right or easement being necessary for the full and free enjoyment of the tunnel right."

Unquestionably and incontestably the Brown indenture which granted and conveyed the right and privilege to have the tailings, waste material and debris transported and carried away by the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries and which subjected and charged the property of Brown with such right and privilege, also granted and conveyed the right and privilege of having such waters, in transporting and carrying away such tailings, waste material and debris, deposit the same upon the property involved in this action.

Such was the holding of the District Court and such

holding is supported by the holding of District Judge Dietrich in the Polak case, which included the interpretation of the Brown indenture and the acts of the appellees in securing it and other similar indentures, to-wit:

> "and, as shown by several instruments in evidence, they acted together in securing from the farmers in the valley, releases and easements as against just such a claim as the plaintiff is here asserting."

Every argument, claim and contention, appearing in the brief of appellant, to the effect that the Brown indenture does not grant and convey to appellees the right and privilege of having the tailings, waste material and debris, produced by the appellees in their mining and milling operations, transported, carried away and deposited by the waters of the Coeur d'Alene River upon the property described in such indenture, and which is claimed by the appellant, is answered, denied and disproven by the incontestable record in this action.

That there may be no further dispute upon this proposition let reference be had to the record which sets forth the claim of the appellant as made by him in his amended complaint, and also the Brown indenture which discloses that such claim has been anticipated and provided against in such indenture; that every act and operation upon the part of the appellees, complained of in the amended complaint, has been authorized by such indenture; that every overflow and deposit upon the property, involved in this action, has been permitted by such indenture, and that appellees by such indenture have been discharged and released from all damages, claims of damages, injuries to such property and consequences resulting from the overflow of such

property by the waters of the Coeur d'Alene River and the deposit of tailings, waste material and debris, produced by the mining and milling operations of the appellees, that may have been carried and deposited upon such property by such waters.

The following is the claim of the appellant found in his amended complaint, to-wit:

> "that for many years the defendants have from their said properties, mined and extracted immense quantities of lead, zinc, copper, silver, and other metals, that in order to separate said minerals from the base rock, and earth in which they are found, and for the purpose of said treatment, the defendants have build, maintained, and operated, continuously, mills and concentrators, and in such operations the defendants have run through said mills and concentrators, daily many thousands of tons of said ores, the exact amount, this plaintiff has no means of knowing, and after said minerals were thus extracted these defendants dumped and cast said refuse, consisting of rock, earth, slimes, tailings, debris, and other poisonous substances into the said Coeur d'Alene River and its tributaries, and upon their banks, which deposits by the natural force and action of the waters of said streams, washed and carried into the Coeur d'Alene River, and down said River, to and during flood times, upon plaintiff's said land;". (R. p. 20.)

Thus it will be seen:

(a) That the appellees have conducted mining and milling operations.

(b) That in such operations appellees, after extracting from their ores the minerals therein contained, dumped and cast the refuse, consisting of tailings, debris and other poisonous substances resulting from such

operations, into the Coeur d'Alene River and its tributaries and upon their banks.

(c) That such deposits by the natural force and action of the waters of said streams were washed and carried into the Coeur d'Alene River and down said river to and, during flood times, upon plaintiff's land.

Four things are complained of:

First, the mining and milling operations of appellees.

Second, the separation by such milling operations of the metals from the ores milled by appellees.

Third, the dumping by appellees of tailings, waste material and debris, produced by their milling operations, into the waters of the Coeur d'Alene River and its tributaries.

Fourth, the carrying of such tailings, waste material and debris by the natural force and action of the waters of the Coeur d'Alene River and its tributaries down said Coeur d'Alene River and upon the lands claimed by the appellant.

The Brown indenture grants and conveys to appellees the right and privilege:

(a) To conduct and carry on all such mining and milling operations.

(b) To use the waters of the Coeur d'Alene River and its tributaries in such mining and milling operations.

(c) To dump the tailings, waste material and debris resulting from such mining and milling operations into the waters of said Coeur d'Alene River and its tributaries and along the banks thereof.

(d) To use such waters of such river and its tribu-

taries for the transportation and carrying away of all such tailings, waste material and debris.

Thus it will be seen that the Brown indenture grants and conveys to appellees the right and privilege to do everything complained of.

Furthermore, the Brown indenture makes the property claimed by the appellant subject to and charges it with all of the acts, operations and uses complained of, and releases appellees from all damages, injuries and consequences resulting from such acts, operations and uses.

It is specifically alleged in the amended complaint that it was by the natural force and action of the waters of the Coeur d'Alene River that such tailings, waste material and debris were carried upon the property involved in this action.

By the Brown indenture there is specifically granted and conveyed to appellees the right and privilege to have such tailings, waste material and debris transported and carried away by the said waters of the Coeur d'Alene River and its tributaries without any limitation as to when or where such waters shall transport and carry such tailings, waste material and debris, and such right and privilege in appellees includes the transporting and carrying of such tailings, waste material and debris upon the property claimed by appellant, and that contention is made incontestable by the further terms and provisions of the Brown indenture which subject said property to and charge the same with such transportation and carrying away of such tailings, waste material and debris.

In view of the interpretation by District Judge Dietrich

and this Honorable Court of the Brown indenture, which is the same as the above interpretation thereof, it is quite possible that too much space has been given in this brief in support of appellees' interpretation of and claim for the Brown indenture, and without repeating the interpretation of District Judge Dietrich and of this Honorable Court they content themselves with presenting a like interpretation by District Judge Cavanah, to-wit:

> "But the plaintiff urges that as the agreement merely grants a license and not a release and easement and the terms thereof do not run with the land, it does not bar him from recovering the damages alleged in the amended complaint. The answer to this contention requires an interpretation of the agreement, which was given by the court at the close of the argument on the motion, but, as it is further urged by plaintiff in his brief, I have given the question further consideration, and from the express language of the instrument it is found that Brown, the predecessor in interest of plaintiff in the land, released the defendants Bunker Hill, Federal and Hecla Companies from all past and future claims for damages for injury to the lands and crops such as are here asserted resulting from the mining operations of such defendants, as it is there clearly recited that the property is made subject to and charged with the mining and milling operations of the defendants in the past and future, when in dumping into and using the waters of the river and the creek for tailings and waste material. Reading the instrument as a whole it will be observed that it clearly conveys the idea and intention of the parties that it grants to the defendants Bunker Hill, Federal and Hecla Companies a release and an easement against just such a claim as the plaintiff is

here asserting, and are covenants running with the land. The same construction was given by the court in receiving in evidence this agreement and others in the case of Polak against these three defendants, and others, and the court there held, referring to these three defendants, that "The two dams referred to here are joint enterprises, and, as shown by several instruments in evidence, they acted together in securing from farmers in the valley, releases and easements as against such a claim as plaintiff is here asserting.' Polak v. Bunker Hill & Sullivan Mining & Concentrating Co., et al. (Decided August 9, 1924). The Polak case went to the Circuit Court of Appeals, and the interpretation there placed upon the instruments was that the companies had 'secured releases from farmers for damages resulting from their mining operations.' Polak v. Bunker Hill & Sullivan Mining & Concentrating Company, 7 F. (2) 583." (R. p. 70.)

After the execution of his indenture Brown held only the servient estate in his property and the appellees held the dominant estate therein, and appellant has no greater estate in such property than the servient estate therein, once held by Brown, and which servient estate is subject to the dominant estate of appellees.

The complaint of the appellant is that the natural force and action of the waters of the Coeur d'Alene River carried upon his lands the tailings, waste material and debris produced by the appellees in their mining and milling operations.

Brown in his indenture granted and conveyed to appellees and their successors and assigns forever the right and privilege of having the waters of the Coeur d'Alene River

carry away such tailings, waste material and debris, and, to eliminate every doubt, question and controversy as to the purpose, force and effect of his conveyance, he made such lands subject to and charged the same with such carrying of such tailings, waste material and debris.

If Brown could not grant and convey such right and privilege of carrying away such tailings, waste material and debris by the waters of the Coeur d'Alene River, and make his lands subject to and charge the same with such carrying away, then Brown could not have maintained any action against these appellees on account of the carrying of such tailings, waste material and debris by the waters of the Coeur d'Alene River upon his lands.

Whatever right, title or interest the appellant has in the property involved in this action, he claims the same through Brown, therefore, he has no better right, title or interest in such lands than Brown had after the execution of his indenture to appellees.

A could not maintain a cause of action against B which he could not waive, or from which he could not release or discharge B.

In the opinion of this Court in McCarthy v. Bunker Hill & Sullivan Mining & C. Co., 164 Fed. 927, 939, Circuit Judge Ross said:

> "In all of the mining states the right to the reasonable use of the public streams for mining purposes is given by usage, custom and law, and by section 3 of article 15 of the Constitution of the state of Idaho, where the properties here in question are situate, miners are given the preferred right to the use of waters of the

streams of that state over, among others, manufacturers and agriculturists."

Any patent that may have issued from the United States for the lands involved in this action contains the following reservation:

"To have and to hold the said tract of land, with the appurtenances thereof, unto the said..... and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of the courts."

Such reservation in such patent from the United States had its inception in an act of Congress, dated July 26, 1866, sections 2339 and 2340 of the Revised Statutes of the United States.

In the case of Broder v. Water Co., 101 U. S. 274, the Supreme Court of the United States interpreted that statute and affirmed the judgment of the Supreme Court of California dismissing an action brought against a water and mining company to have its canal declared a nuisance and abated, and to recover $12,000 damages on account of its maintenance on plaintiff's land.

In its opinion the Supreme Court said:

"As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and cannot now disturb it. * * *

It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons

who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a preexisting right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. * * *

The defendant had been in possession of the claim in question for twelve years when this act was passed, and had expended $200,000 upon it. It was of great utility, nay necessity, to a large agricultural and mining interest, and we cannot doubt that it was of the class which this section declared should not be defeated by the grant which Congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is

Affirmed."

In Atchison v. Peterson, 20 Wall. 507, 510, the Supreme Court of the United States, in its opinion affirming the decree of the Supreme Court of Montana denying an injunction against a subsequent appropriator for mining purposes from discharging mining tailings into a stream which caused such tailings to be carried into the ditch of a prior appropriator, said:

"By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on

such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relative to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection." * * *

"This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866."

After quoting the following language of the Supreme Court of California in Jacob v. Day, 44 Pac. 243, 245, to-wit:

"Every use of water for purposes of hydraulic mining, sanctioned by local custom and law, is recognized as a right and protected as such.",

Mr. Lindley in his work on Mines, Third Edition, Vol. 3, Sec. 841, page 2069, said:

"What is here said applies with equal force to general mining and milling operations. The tailings from an ordinary quartz-mill, when discharged into the running streams, have no greater tendency to deteriorate the quality of the water than the material washed from the natural banks. As a physical impediment they are comparatively harmless. They are fine particles of sand artificially produced, but of the same character as that washed into the streams from the rocks eroded by processes of nature which are universal. While the privilege of depositing such tailings in the streams must be rea-

sonably exercised, and so as not to materially impair or destroy rights acquired by a lawful prior appropriator, yet to say that the discharge of such tailings is a nuisance per se, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value. Should any such stringent rule be invoked in regard to either quartz or hydraulic mining, the industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water."

That right to use the waters of public streams for mining and milling purposes has been held by the courts and declared by statute and constitution to be a property right.

Brown claimed that his property had depreciated in value and been damaged as the result of the exercise by appellees of that property right.

To relieve themselves from such claim appellees paid for and secured a grant and conveyance from Brown to them of the right and privilege to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries for the transportation and carrying away of the tailings, waste material and debris produced in the employment of such property right; and Brown went farther and charged his property with and made it subject to such use by the appellees, which included the right and privilege of having the waters of the Coeur d'Alene River transport and carry such tailings, waste material and debris upon his property.

The contention that Brown could not and did not grant and convey to appellees every right which he had to question, oppose or object to the right and privilege of the

appellees to exercise and enjoy their property right to use the waters of the Coeur d'Alene River, the South Fork of the Coeur d'Alene River and its tributaries in their mining and milling operations and for the transportation and carrying away of all the tailings, waste material and debris produced in their mining and milling operations, and could not and did not by his indenture make his property subject to and charge the same with such use, which included the transportation and carrying by such waters of such tailings, waste material and debris down to and upon his property, is wholly without reason or merit.

If Brown could not grant and convey the right and privilege to appellees to use that property right, and could not make his property subject to and charge the same with the right and privilege in the appellees to exercise that property right, and thereby relieve appellees from every claim of right on his part and upon the part of his assigns, (so far as concerned the property claimed by appellant,) to object to the exercise and enjoyment of such property right, then Brown could not have any cause of action against the appellees on account of the depreciation in value of or damage to his property as the result of the employment by the appellees of that property right, nor could appellant have any cause of action against appellees by reason of the depreciation in value of and damage to the same property resulting from the exercise by the appellees of that property right.

However, Brown could and did grant and convey to appellees the right and privilege to exercise and enjoy that

property right, and he could and did subject his property to and charge the same with the right and privilege in appellees to exercise and enjoy that property right, and appellant and the property claimed by him are bound by such grant, conveyance, subjection and charge, and appellant had no right to maintain this action against appellees in the District Court, and these appellees respectfully urge that the judgment of dismissal rendered by the District Court be affirmed.

Respectfully submitted,

C. W. BEALE,

Attorney for Appellees.

Residence and Post Office Address,

Wallace, Idaho.

Service of the above and foregoing brief admitted, accepted and received and two true copies of said brief received and accepted this ..... day of May, A. D. 1930.

.....

.....

Attorneys for Appellant.